UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/371
13 July 1992

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Twenty-sixth session
Vienna, 7-25 June 1993

REPORT OF THE WORKING GROUP ON THE NEW INTERNATIONAL ECONOMIC ORDER ON THE WORK OF ITS FIFTEENTH SESSION

(New York, 22 June-2 July 1992)

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INTRODUCTION

1. At its nineteenth session, in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order. 1/ The Working Group commenced its work on this topic at its tenth session, held from 17 to 25 October 1988, by considering a study of procurement prepared by the Secretariat (A/CN.9/WG.V/WP.22). The Working Group requested the Secretariat to prepare a first draft of a model law on procurement and an accompanying commentary taking into account the discussion and decisions at the session (A/CN.9/315, para. 125).

2. At its eleventh session (5-16 February 1990), the Working Group considered a draft of the model law on procurement and an accompanying commentary prepared by the Secretariat (A/CN.9/WG.V/WP.24 and A/CN.9/WG.V/WP.25). The Working Group requested the Secretariat to revise the text of the model law taking into account the discussion and decisions at the session and agreed that the commentary would not be revised until after the text of the model law had been settled. In addition, the Working Group requested the Secretariat to prepare for the twelfth session draft provisions on the review of acts and decisions of, and procedures followed by, the procuring entity (A/CN.9/331, para. 222).

3. At its twelfth session (8-19 October 1990), the Working Group had before it the second draft of the model law (A/CN.9/WG.V/WP.28), and the draft provisions on the review of acts and decisions of, and procedures followed by, the procuring entity (draft articles 36 to 42, contained in A/CN.9/WG.V/WP.27). At that session, the Working Group reviewed the second draft of articles 1 to 27. The Working Group requested the Secretariat to revise articles 1 to 27 to take account of the discussions and decisions concerning those articles at the twelfth session (A/CN.9/343, para. 229). During the adoption of the report of the twelfth session, the Secretariat was further requested to prepare a report for the thirteenth session on conditions and procedures for use of competitive negotiation.

4. At its thirteenth session (15-26 July 1991), the Working Group had before it the second draft of articles 28 to 35 (contained in A/CN.9/WG.V/WP.30), a redraft of articles 1 to 27, taking into account the deliberations and decisions at the twelfth session (also contained in A/CN.9/WG.V/WP.30), the draft articles on review (articles 36 to 42, in A/CN.9/WG.V/WP.27), as well as a note by the Secretariat on competitive negotiation (A/CN.9/WG.V/WP.31). At that session, the Working Group reviewed articles 28 to 42 and requested the Secretariat to revise those articles to take account of the discussion and decisions at the thirteenth session (A/CN.9/356, para. 196).

1/ Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17), para. 243.

5. At the fourteenth session, the Working Group reviewed articles 1 to 27 as revised following the twelfth session (contained in A/CN.9/WG.V/WP.30), as well as articles 28 to 41 (article 42 having been deleted at the thirteenth session), revised to reflect the decisions taken at the thirteenth session (A/CN.9/WG.V/WP.33). Also reviewed by the Working Group was the annex to document A/CN.9/WG.V/WP.33, which contained several new provisions that had been added either as a result of decisions taken at the thirteenth session or at the initiative of the Secretariat, as well as a number of changes to the first portion of the Model Law (articles 1 to 27) that flowed from the Working Group's decisions at the twelfth session with regard to articles 28 to 42. The Working Group also had before it a note on suspension of the procurement proceedings that it had requested at the thirteenth session (A/CN.9/WG.V/WP.34). The Working Group requested the Secretariat to revise the draft articles of the Model Law to reflect the deliberations and decisions at the fourteenth session (A/CN.9/359, para. 247). The Working Group also agreed that a commentary giving guidance to legislatures enacting the Model Law should be given priority, without precluding the possibility of preparation at a later stage of commentaries with other functions. It was further agreed that completion of the Working Group's consideration of the Model Law should not be delayed until the preparation by the Secretariat of a draft commentary (A/CN.9/359, para. 249).

6. The Working Group, which was composed of all States members of the Commission, held its fifteenth session in New York from 22 June to 2 July 1992. The session was attended by representatives of the following States members of the Working Group: Bulgaria, Cameroon, Canada, Chile, China, Egypt, France, Germany, India, Iran (Islamic Republic of), Japan, Kenya, Nigeria, Poland, Russian Federation, Spain, Thailand, Togo, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Uruguay.

7. The session was attended by observers from the following States: Brazil, Colombia, Côte d'Ivoire, Indonesia, Iraq, Malta, Marshall Islands, Myanmar, Pakistan, Philippines, Romania, Switzerland and Viet Nam.

8. The session was also attended by observers from the following international organizations:

(a) United Nations organizations: World Bank;

(b) Intergovernmental organizations: European Communities, European Space Agency, Inter-American Development Bank;

(c) International non-governmental organizations: International Bar Association.

9. The Working Group elected the following officers:

Chairman: Mr. Robert Hunja (Kenya)

Rapporteur: Mr. Hossein Ghazizadeh (Islamic Republic of Iran).

10. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.V/WP.35);

(b) Procurement: draft articles 1 to 41 of Model Law on Procurement (A/CN.9/WG.V/WP.36).

11. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Procurement.
4. Other business.
5. Adoption of the report.

12. The deliberations and decisions of the Working Group with respect to its consideration of draft articles 1 to 41 of the Model Law on Procurement are contained in chapter I of the present report.

13. The Working Group established a drafting group to which it referred the draft articles of the Model Law following its approval of the substance of those articles. The Working Group reviewed the report of the drafting group and adopted the text of the draft Model Law on Procurement as set forth in the annex.

DELIBERATIONS AND DECISIONS

I. DISCUSSION OF DRAFT ARTICLES 1 TO 41 OF THE MODEL LAW ON PROCUREMENT (A/CN.9/WG.V/WP.36)

General remarks

14. Prior to commencing its review, the Working Group recalled that at its fourteenth session it had expressed the intention to complete its task of preparing the draft Model Law at the fifteenth session for presentation to the Commission at its twenty-sixth session.

Preamble

15. The Working Group reaffirmed the decision taken at its fourteenth session that the Model Law should contain a preamble as such an overall statement of the objectives of the law would be useful in the application and interpretation of the Model Law. As to the precise formulation of the preamble, the view was expressed that subparagraphs (d), (e) and (f) in the

current draft of the preamble overlapped and were vague and might therefore be merged, or perhaps even deleted. The prevailing view, however, was that the subparagraphs were useful as they indicated the distinct objectives of the Model Law and the various types of procedural obligations and intended beneficiaries of the Model Law. It was further observed that terms used in the preamble, to the extent that they were unclear, might be elaborated upon in the commentary. After deliberations, the Working Group approved the substance of the preamble and referred to the drafting group the possible refinement in the wording.

16. The Working Group next considered whether it would be desirable to include in the Model Law explanatory footnotes aimed at giving guidance on specific provisions to legislatures enacting the Model Law. In this instance, the Working Group was considering a proposal to include such a footnote for the preamble, indicating that States might wish to place the contents of the preamble in a substantive provision. There was general agreement that the provisions of the Model Law should be self-standing and that guidance to legislatures should be confined to the commentary, rather than being given also in footnotes.

Article 1

Scope of application

17. The Working Group considered the revised version of article 1 as contained in document A/CN.9/WG.V/WP.36.

18. Concerns were expressed that paragraph (2) (c), by permitting a State to exclude certain types of procurement from the Model Law through the procurement regulations, might lead to abusive exclusions of the Model Law. However, it was generally agreed that the Model Law had to provide such an option to enacting States. Moreover, it was observed that a degree of transparency existed in that the procurement regulations would have to be published. It was also suggested that the commentary might urge caution in the use of procurement regulations to exclude the Model Law.

19. The Working Group affirmed the approach taken in paragraph (2), which allowed certain sectors to be excluded, while permitting the procuring entity to apply the Model Law in those sectors on an ad hoc basis. The Drafting Group was requested, however, to consider ways of making the meaning of paragraph (2) clearer. Suggestions included, for example, relocating the closing words of subparagraph (c) to the *chapeau* or adding a separate paragraph concerning ad hoc applications of the Model Law in excluded sectors.

20. The Working Group agreed to replace the word "declares" in the closing portion of paragraph (2) (c) by the words "expressly declares" to ensure that the declaration was sufficiently clear to those concerned, and would be included in the instrument used to solicit participation in the procurement proceedings.

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21. Subject to the above modification, the Working Group found article 1 to be generally acceptable.

Article 2

Definitions

22. The Working Group considered the revised version of article 2 as contained in document A/CN.9/WG.V/WP.36.

23. It was suggested that, for ease of reference, the definitions should be placed in alphabetical order in each respective language version of the Model Law. A countervailing view was that, given the relatively low number of definitions, the hierarchical approach used here, as well as in other Commission texts, was preferable.

"Procurement" (subparagraph (new a))

24. As had been the case at the fourteenth session, a question was raised as to the manner in which the definition dealt with incidental services. In particular, the view was expressed that the mathematical formula used to define incidental services (expressed in the words "if the value of those incidental services does not exceed that of the goods or construction themselves") was of questionable utility. It was suggested that that language raised difficulties in particular because construction consisted to a large degree of services. Along those same lines it was suggested that a discussion in the commentary, decided upon at the fourteenth session, concerning the determination of whether services were incidental might not be sufficient and that the Model Law should be self-explanatory on that point. Again, however, the prevailing view was to retain the use of the mathematical formula. It was noted that the language in question was in line with the Working Group's earlier decision that, at least for the present time, the Model Law should not address the procurement of services and that it was usefully consistent with the language in the GATT Agreement on Government Procurement.

25. After deliberation, the Working Group decided that the definition of "procurement" was generally acceptable. The Drafting Group was requested, however, to ensure that all the language versions of the Model Law were fully aligned with respect to the various means of acquisition referred to in the definition.

"Procuring entity" (subparagraph (a))

26. The Working Group found the definition of "procuring entity" to be generally acceptable. A proposal was made that both option I and option II should be applicable to organs of local self-government. The general view, however, was that the present structure was suitable, as it was the understanding of the Working Group that option I was intended to cover organs of self-government, while option II was not.

"Goods" (subparagraph (b))

27. Doubts were raised as to the utility of retaining the reference to "systems" that had been added pursuant to a decision at the fourteenth session. While it was recognised that the reference to "systems" was intended to take account of the fact that goods were often procured as elements integrated into a package or system, it was generally felt that such circumstances were adequately covered without the addition of the word "systems". It was also noted that the term would create uncertainty, in particular with respect to procurement of software. In that regard, it was suggested that, were the word "systems" to be retained, a distinction might have to be made between off-the-shelf procurement of software and procurement of software tailored to the specifications of the procuring entity, the latter type of procurement presumably falling within the realm of services. It was also observed that the discussion suggested the likely need to eventually formulate provisions covering the procurement of services. After deliberation, the Working Group agreed to the deletion of the reference to "systems".

"Construction" (subparagraph (c))

28. The Working Group found the definition of "construction" to be generally acceptable.

"Currency" (subparagraph (g))

29. The Working Group agreed to a suggestion to replace the words "unit of account" by the words "monetary unit of account".

"Contractor or supplier" (subparagraph (i bis))

30. A question was raised as to whether the reference in the definition to "any ... potential party, according to the context" might not be overly broad, particularly when applied to the right of recourse under article 36. It was suggested that the definition might have to be limited in some fashion so that it would not be misread as encompassing, for example, subcontractors of potential contractors and suppliers. The exclusion of any mention at all of potential contractors and suppliers, or the inclusion of a narrow link to the procurement proceedings, were not considered to be practical alternatives, in particular since there would be cases, including in the recourse context, where the Model Law would intend to refer to very broad categories of contractors and suppliers (e.g., all the potential contractors or suppliers producing a particular type of goods). In view of the above, the Working Group affirmed the broad approach taken in the general definition, subject to the possibility that the term would have to be specifically limited in substantive provisions in order to exclude in certain contexts contractors and suppliers with insufficient proximity.

31. The Working Group referred to the drafting group a proposal to replace throughout the Model Law the terms "contractor and supplier" and "contractor

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or supplier" by a single word such as "supplier", which could be done by indicating in the definition that the term "supplier" encompassed the term "contractor". Such a definition would be necessary, in particular to take account of legal systems in which the two terms traditionally carried distinct meanings.

Additional definitions

32. The Working Group agreed to a proposal to add a definition of "procurement contract" as "a contract between the procuring entity and the contractor resulting from the procurement proceedings". It also agreed to a proposal to return the definition of "tender security" from article 26 to its former position in subparagraph (f), in particular since that term appeared in several places prior to article 26. The Working Group considered, but did not go along with, a proposal to restore definitions of the various methods of procurement. The Working Group was of the general view that such definitions, if they included substantive elements, might conflict with other substantive provisions of the Model Law. If definitions of procurement methods were to be merely descriptive references to the substantive provisions, as had been the case with the definitions that the Working Group had previously decided to delete, they would serve little if any purpose, thereby unnecessarily burdening the Model Law. At the same time, it was observed that, on their face, terms such as "competitive negotiation proceedings" might not be readily recognized and that it could be useful to provide some descriptions in the commentary or in a covering memorandum, if not in introductory paragraphs in the substantive provisions.

Article 3 *bis*

International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

33. The Working Group considered the revised version of article 3 *bis* as contained in document A/CN.9/WG.V/WP.36.

34. The Working Group affirmed its decision at the fourteenth session (reflected in subpara. (c)) to give precedence over the Model Law to intergovernmental agreements on procurement concluded within a federal State. The view was expressed that the text of the subparagraph should make it clear that the subparagraph was not intended to deal with the situation where the application of the Model Law was met with a constitutional impediment, particularly in the case of federal States in which the national government did not possess the power to legislate for its subdivisions with respect to matters covered by the Model Law.

35. It was agreed that the scope of subparagraph (c) should be expanded to refer not only to agreements between the federal Government and a subdivision, but also to agreements between subdivisions. Such an expansion could be relevant in particular where the Model Law was enacted by a subdivision of a

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federal State. Accordingly, the following suggested reformulation of subparagraph (c) was transmitted to the drafting group:

> "(c) agreements between a Government in [name of federal State] and another Government in [the federal State]."

36. Subject to the above modifications, the Working Group found article 3 bis to be generally acceptable.

Article 4

Procurement regulations

37. The Working Group considered the revised version of article 4 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

38. In the discussion of article 4, it was observed that there would in all likelihood be instances where the Model Law would be enacted, at least at an initial stage, without being accompanied by procurement regulations, and that the Model Law should therefore provide a body of self-standing rules. It was further observed that the possibility of such cases arising would have to be kept in mind in particular where the Model Law contemplated the procurement regulations as a source of authority for action by the procuring entity.

Article 5

Public accessibility of procurement law, procurement regulations and other legal texts relating to procurement

39. The Working Group considered the revised version of article 5 as contained in document A/CN.9/WG.V/WP.36.

40. The Working Group agreed to expand article 5 so as to obligate the procuring entity to maintain systematically the various materials that were the subject of the article, as well as to make those materials available promptly. Subject to that modification, the Working Group found article 5 to be generally acceptable.

Article 7

Methods of procurement

41. The Working Group considered the revised version of article 7 as contained in document A/CN.9/WG.V/WP.36.

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Paragraph (1)

42. The Working Group was in general agreement with the thrust of paragraph (1), namely, that tendering proceedings should be the method of procurement normally used. It also agreed to the deletion of the word "only", which was felt to be superfluous. A proposal was made to replace the words "tendering proceedings" by the words "public tendering" so as to give additional emphasis to the open, competitive character of tendering proceedings. However, that proposal did not receive support, in particular because of a concern that the proposed new term would lead to uncertainty in the context of limited tendering carried out pursuant to article 12 (2) (a).

Paragraphs (new 2) and (new 3)

43. As had been the case at previous sessions, differing views were expressed as to the desirability of presenting in the Model Law the entire array of procurement methods currently included, with particular attention being paid on this point to two-stage tendering, request for proposals and competitive negotiation. According to one view, it was sufficient to include, of those three, just two-stage tendering, while possibly mentioning the others in the commentary. Another, similar view was that one method should be retained, but that it should be request for proposals. Both of those approaches were fuelled in particular by a concern that the Model Law should not recommend the use of competitive negotiation, which was described as the method of procurement subject to the lowest degree of discipline and thereby the most likely to lead to abuse.

44. The prevailing view, as had been the case previously, was that the Model Law should be as inclusive as possible and that, since each of the three methods in question were used in practice, they should be available under the Model Law. In support of inclusion of competitive negotiation, it was suggested that that method of procurement was used in a number of States and was an appropriate method of procurement in certain circumstances. When properly utilized, competitive negotiation was said to be capable of promoting economy and efficiency in procurement. It was also suggested that inclusion of competitive negotiation would foster competition since, without having competitive negotiation as an available option, some procuring entities would resort to less competitive methods, in particular single-source procurement.

45. A view was expressed that limited tendering proceedings, permitted under article 12 (2) (a), should be made more visible in the Model Law by being listed in paragraph (new 2) as one of the methods other than tendering. The Working Group decided to deal further with the question of limited tendering in its review of article 12.

46. It was noted that a number of issues were left outstanding by the decision of the Working Group at the fourteenth session that the Model Law should not recommend that enacting States necessarily incorporate each of the methods of procurement other than tendering listed in paragraph (new 2), though such a possibility would not be excluded. That decision stemmed in

particular from a recognition that there was a degree of overlap in the conditions for use of two-stage tendering, request for proposals and competitive negotiation in that each of those methods was geared, at least in part, to cases in which the procuring entity was not in a position to formulate specifications to the level of detail required for tendering proceedings. The issues left outstanding by that decision included: how to deal with differences in the conditions for use of two-stage tendering, request for proposals and competitive negotiation given the decision to make those methods interchangeable; whether there was any point in retaining the hierarchical order of preference set forth in paragraph (new 3) to be used when the circumstances of a particular procurement fit the conditions for use of more than one of the methods of procurement referred to in paragraph (new 2); and how to deal with overlap between competitive negotiation and single-source procurement with respect to research contracts and national security procurements.

47. As regards the conditions for use of the three procurement methods in question, the Working Group noted that the conditions for use of competitive negotiation covered two situations not covered by the other methods of procurement, namely, urgency not related to catastrophic events (new article 34 (b)) and failed tendering proceedings (new article 34 (e)). As a result, an enacting State that did not incorporate competitive negotiation would be left without a procurement method to cover those two situations. In order to eliminate this gap, the Working Group decided that the conditions for use for the three methods of procurement should be identical not only with respect to the case of incomplete specifications, but also with regard to the circumstances covered in new article 34 (b) and (e). It also agreed that it would look further at cases of urgency when it reached the articles dealing with the methods in question.

48. In the course of its consideration of paragraph (new 2), the Working Group decided that it would be preferable to assemble in article 7 the conditions for use of each of the methods of procurement other than tendering. Those conditions were presently found in the respective articles governing the use of those methods. It was felt that that structure would be clearer and that it would alleviate to some degree the concern underlying a proposal to include definitions of the procurement methods - a proposal that did not itself attract sufficient support.

49. The Working Group then turned to the question of whether the Model Law should recommend that enacting States incorporate any, only one, or one or more of two-stage tendering, request for proposals and competitive negotiation, or whether no attempt should be made to indicate whether only one or more than one of those methods should be incorporated. On this question, the Working Group reached the conclusion that the Model Law should recommend the adoption of at least one of those three methods, so as to avoid suggesting that cases not suitable for tendering could generally be dealt with through single-source procurement. The Working Group was of the view that, beyond the recommended minimum of one of those methods, it would be preferable not to attempt to limit the choices presented to the enacting State. It was

recognized that an enacting State might legitimately see a benefit in incorporating more than one of the three methods so as to give procuring entities added flexibility in choosing procurement methods most appropriate for the circumstances of individual cases.

50. The Working Group drew the conclusion that, taking into account the evolution of article 7, the hierarchical order of preference set forth in paragraph (new 3) would no longer serve a purpose and should therefore be deleted. It was generally felt that the order of preference, which was designed to address the problem of overlap between earlier versions of the conditions for use of two-stage tendering, request for proposals and competitive negotiation, no longer played any role as a result of the assimilation of the conditions for use for those three methods. The decision to remove the order of preference was also motivated by the widely shared view that the objectives of the Model Law would be best served by giving the procuring entity some discretion to select the procurement method best suited to individual cases on the basis of the principles enunciated in the preamble.

51. It was pointed out that an overlap remained between, on the one hand, competitive negotiation (and now also two-stage tendering and request for proposals), and, on the other hand, single-source procurement, as regards research contracts. It was suggested that the overlap with respect to that case, as well as perhaps the similar overlap with respect to national security and national defence, might be addressed by limiting resort to single-source procurement in such cases to instances where there was only one possible contractor or supplier. As regards research contracts, the question was raised whether such contracts, which might be characterized as having a service nature, at all fell within the scope of the Model Law. In response, it was pointed out that the research contracts addressed in the Model Law involved the purchase of a prototype and therefore could properly be considered as involving the procurement of goods.

Paragraph (5)

52. It was suggested that the record requirement in paragraph (5) could be usefully strengthened by requiring a procuring entity that had to choose between two or more of two-stage tendering, request for proposals and competitive negotiation to state the grounds and circumstances underlying the decision to choose one over the other one or two methods. It was stated that such a formulation would serve the objective of transparency. While there was sympathy for the thrust of the suggestion, the Working Group was generally of the view that such a requirement could probably already be read in paragraph (5) and would be necessitated at any rate by good administrative and regulatory practice. The Working Group requested the Drafting Group to consider further whether the existing formulation covered the matter adequately. A proposal to eliminate the words "grounds and", which had been added to align the text with similar provisions elsewhere in the Model Law, did not receive support.

53. The Working Group found article 7 to be generally acceptable, subject to the above modifications.

Article 8

Qualifications of contractors and suppliers

54. The Working Group considered the revised version of article 8 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (new 1)

55. The Working Group found paragraph (new 1) to be generally acceptable.

Paragraph (1)

56. The Working Group considered whether to retain subparagraph (a) (ii), which authorized the procuring entity to require contractors and suppliers to show that they were not insolvent. That question was prompted by the apparent possibility that the broad grant of authority in subparagraph (new i) to demand evidence with respect to the financial resources of contractors and suppliers could be read as covering the same ground as subparagraph (a) (ii). The prevailing view was that both subparagraphs (a) (ii) and (a) (new i) should be retained as they dealt with distinct aspects of the qualifications of contractors and suppliers. It was noted, for example, that a contractor or supplier might possess sufficient technical competence and financial resources as required by subparagraph (a) (new i), and yet still fail to satisfy the requirements of subparagraph (ii) by reason of suspension or court administration of business activities.

Paragraph (2)

57. A proposal was made to delete the second sentence of paragraph (2), which prohibited a procuring entity from imposing additional criteria, requirements or procedures with respect to the qualifications of contractors and suppliers, other than those provided for in paragraph (1) (a). In support of the proposal, it was stated that a procuring entity should have the flexibility to impose additional criteria should it be deemed necessary to do so. However, the proposal did not receive support. It was generally felt that the qualification of contractors and suppliers should be based on criteria clearly established in the Model Law and set out in the prequalification documents and that the establishment of additional criteria might lead to the abusive exclusion of particular contractors and suppliers.

Paragraphs (2 bis), (2 ter) and (2 quater)

58. The Working Group found paragraphs (2 *bis*), (2 *ter*) and (2 *quater*) to be generally acceptable.

Paragraph (3)

59. The Working Group next considered the question of when the cut-off time should be for the presentation by contractors and suppliers of proof of

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qualifications. While mention was made of the possibility of extending the deadline to the time of award of the procurement contract, there was general sympathy for the approach taken in paragraph (3), which set the deadline at the commencement of the examination of tenders, proposals or offers. However, there was a concern that that formulation might be imprecise and give rise to disputes. In view of the above, the Working Group decided that the cut-off time should be the deadline for the submission of tenders.

Other issues

60. It was proposed that article 8 should contain a provision restricting the right of the procuring entity to disqualify contractors and suppliers owing to minor omissions or errors in the evidence presented as proof of qualifications. To that end, it was suggested that the Model Law should require the procuring entity to permit contractors and suppliers a limited period of time to correct minor errors and deviations occurring in the documents. It was stated that such a restriction would help to promote fairness and competition by curbing abusive disqualification of contractors and suppliers. The Working Group noted that there was a link between that question and the provisions in article 28 (1 bis) concerning the responsiveness of tenders and that, subject to the discussion of article 28, it might be considered as adequately dealt with there.

61. A concern was expressed that article 8 as currently drafted did not actually require the procuring entity to qualify a contractor or supplier that had met the conditions set out in paragraph (1) (a), although such a requirement might be implied in the totality of the relevant provisions. The prevailing view was that the obligation to qualify contractors and suppliers that met the requirements derived from the provisions of article 8, in particular paragraphs (2), (2 bis) and (2 ter), concerning the procedures and criteria for evaluation. Another source of the obligation, in tendering proceedings, was the obligation of the procuring entity under article 28 to evaluate tenders in accordance with criteria set forth in the solicitation documents. It was also pointed out that such an obligation derived from the general principles of administrative law in many countries.

62. With the amendment adopted with respect to paragraph (3), the Working Group found article 8 generally acceptable.

Article 8 bis

Prequalification proceedings

63. The Working Group considered the revised version of article 8 bis as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

64. The Working Group found paragraph (1) to be generally acceptable.

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Paragraph (2)

65. The view was expressed that the mention of "the procedures specified in the invitation to prequalify" might unduly narrow the scope of the provision and that a formulation along the lines of "the terms and conditions specified in the invitation to prequalify" might be more appropriate. It was also stated that, since the suggested wording would cover such issues as the obligation for each contractor or supplier to pay the price charged for the prequalification documents, the specific mention of the price would not be needed. While it was generally agreed that a broader wording such as the one suggested should be used, it was also generally felt that the express reference to the obligation to pay the price charged for the prequalification documents served a useful purpose and should be retained. As regards the price of those documents, a view was expressed that a proviso should be added to the effect that the price charged for the prequalification documents should reflect the actual cost of those documents and should not be so high as to discourage participation by any contractor or supplier.

Paragraph (3)

66. The Working Group next considered the manner in which the Model Law should address the required contents of the prequalification documents. At the previous session, the Working Group had decided, with a view to ensuring uniformity of law, that the Model Law should list the required contents in detail rather than merely referring to the procurement regulations.

67. At the current session, a view was expressed that the listing of the requirements in paragraph (3), and particularly in subparagraphs (c), (d), (e) and (g) might put an excessive burden on the procuring entity and should therefore be deleted. However, the Working Group reaffirmed the decision made at the last session that the requirements listed in paragraph (3) were an indispensable bare minimum that would otherwise have to be listed in the procurement regulations, and that the right to use the procurement regulations to list additional requirements was available under subparagraph (g). It was noted that article (3) (d) overlapped with article 14 (1) (d), which was incorporated into the prequalification documents by way of the *chapeau* to paragraph (3), and that the two provisions could be consolidated.

Paragraphs (3 bis) to (6)

68. The Working Group found paragraphs (3 *bis*) to (6) to be generally acceptable.

Article 8 ter

Participation by contractors and suppliers

69. The Working Group considered the revised version of article 8 *ter* as contained in document A/CN.9/WG.V/WP.36.

70. The Working Group again affirmed the basic principle enunciated in article 8 ter, namely, that contractors and suppliers should, with limited exceptions, be permitted to participate in procurement proceedings without regard to nationality. The Working Group proceeded to consider further refinements of the article.

Paragraph (1)

71. At the outset, the view was expressed that it was not sufficiently clear that paragraph (1) was composed of two distinct components, the first (subpara. (a)) referring to the closure of procurement proceedings to all but domestic contractors and suppliers for reasons of economy and efficiency, and the second (subpara. (b)) referring to nationality-based restrictions stemming from factors such as tied-aid arrangements and boycott legislation.

72. As to the first component (subpara. (a)), the view was expressed that permitting restriction to domestic participants on the basis of "economy and efficiency" was an imprecise and vague notion that might be considered as contrary to the general principles set forth in the preamble, in particular international competition as a means of maximizing economy and efficiency in procurement. An alternate, perhaps more objective standard that was reported to be used widely to delineate international from domestic procurement was the value of the procurement.

73. In addition, it was suggested that the various types of cases that were relevant to article 8 ter might not be clear from the current formulation. Those cases included: low value procurements of goods available locally, for which the procuring entity would not solicit international tenders, but from which it would not exclude foreign contractors and suppliers; the exclusion of foreign participants, in order, for example, to promote local capacity in a given sector; and mandatory embargoes, for example, Security Council sanctions. With that possible scope in mind, the Working Group proceeded to a further review of article 8 ter.

74. As to the first type of case, it was noted that there would be cases where it would be inappropriate to require the procuring entity to engage in costly, time-consuming procedures designed to attract international competition, for example in cases where small amounts were involved. At the same time, it was suggested that in such cases there was no need to exclude foreign contractors from certain procurements if such foreign contractors were naturally kept out of those procurement proceedings for market reasons. In addition, it was pointed out that exclusion of foreigners on grounds of nationality might be economically unjustified even in the case of small procurements since foreign contractors might have a local place of business. In the course of the discussion, it was urged that the only realistic course would be for the Model Law to recognize the fact that States would wish to retain the right to limit procurement in some cases to domestic suppliers.

75. The Working Group considered several proposals designed to accommodate low-value, small procurements without excluding foreign participation. One

proposed reformulation of subparagraph (a) was as follows:

> "... except that:
>
> (a) in the case of tendering for smaller size contracts, where international participation is unlikely, the special procedures to attract such competition as set forth in articles ... shall not apply;"

76. That proposal was objected to on the grounds that the notion of small procurements was ambiguous and could receive different interpretations, though it was agreed that small procurements could be addressed in a separate provision in the provisions on tendering. A proposal of a somewhat similar nature was to refer in subparagraph (a) to "soliciting" participation rather than to "permitting" participation, thereby putting the focus on the types of measures the procuring entity would or would not have to take in a given case.

77. Other suggestions were to move subparagraph (a) into a separate provision or to move article 8 ter in its entirety back to chapter II of the Model Law. That approach would confine the presumption of internationality and the exceptions thereto to tendering proceedings. While some support was expressed in favour of that proposal, the Working Group affirmed its earlier decision to transfer the provision on participation by contractors and suppliers from chapter II to the general provision of the Model Law in chapter I so as to apply the presumption of internationality to all methods of procurement. That modification was intended to encourage greater openness in procurement and equal treatment of foreign contractors and suppliers when procurement proceedings involving methods other than tendering were conducted on an international footing. At the same time, the procuring entity would not be compelled to engage in international procurement when deemed counter to economy and efficiency or on other grounds mentioned in the article.

78. It was pointed out that subparagraph (b) might be regarded as containing sufficient grounds for the types of domestic procurement situations being contemplated in subparagraph (a). The Working Group agreed with that approach and accordingly decided that subparagraph (a) could be deleted. It was also noted that reference would be made in the commentary of the practice of States concerning domestic procurement and to the fact that such procurement was not excluded under the Model Law.

79. As to the content of subparagraph (b), the Working Group affirmed the decision it had taken previously to include the procurement regulations as a source of authority for restriction of participation on the basis of nationality.

Paragraphs (new 1 bis) and (1 bis)

80. The Working Group found paragraphs (new 1 bis) and (1 bis) to be generally acceptable. It was noted, however, that almost all of the articles referred to in paragraph (1 bis) concerned tendering proceedings and that the provision might therefore be placed into chapter II.

Paragraph (3)

81. The need for retaining paragraph (3) was questioned on the grounds of the general presumption of internationality in tendering proceedings, and because, in other methods of procurement, contractors and suppliers were often singled out by the procuring entity for participation in the procurement proceedings. The Working Group felt that the usefulness of the provision justified its retention.

Article 9 bis

Form of communications

82. The Working Group considered the revised version of article 9 bis as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

83. The Working Group affirmed the decision taken at the fourteenth session that the Model Law should enable procuring entities to engage in procurement proceedings involving non-traditional forms of communications such as electronic data interchange ("EDI"). It also noted that the notion of "record", referred to in paragraph (1), was a key function of a written document that could be fulfilled through electronic means of communication.

84. Various views were expressed with regard to the formulation of article 9 bis, which attempted to include in a consolidated provision on form of communication the authority needed to enable the procuring entity to employ, if it so chose, EDI and other modern communication and information techniques in procurement proceedings. One view was that the approach taken in article 9 bis was over-complicated and might be perceived as imposing the use of EDI on countries where access to such technology was limited, and furthermore the blanket superimposition of such procedures on traditionally paper-based countries was said to be fraught with hazards. A particular concern was expressed in that regard with respect to the provision in article 24 (4) authorizing the submission of tenders in forms other than writing.

85. A countervailing view was that the approach taken in the draft was basically sound in that it enabled the use of EDI without imposing it on those who wished to continue to use paper-based procedures. Attention was also drawn to the need for the Model Law to recognize, rather than hinder, the existing use of EDI in procurement, as well as to facilitate the future expansion of such techniques. It was said that the lack of such an orientation would limit the acceptability of the Model Law.

86. A key question was the manner in which the notion of writing should be treated. It was noted in that regard that the current chapter displayed two possible approaches to the use of the word "writing". Paragraph (1) could be

read as defining writing as including any form that provided a record, while in article 24 (4) reference was made to writing as separate from other forms that provided a record.

87. A proposal to delete all mention of writing was not accepted. It was stated that that would go too far since the Model Law provisions had been developed with the traditional paper-based documentation in mind and the technical implications of the use of EDI in procurement proceedings and the question of guaranteeing confidentiality in the context of EDI had not been considered during the development of the Model Law. It was further emphasized that the use of EDI was not uniformly available world wide.

88. After deliberation, the Working Group decided to retain paragraph (1) along its present lines, but that an appropriate balance could be struck by including at the beginning of the paragraph the words "Subject to the provisions of this Law".

Paragraph (2)

89. It was proposed to delete paragraph (2) on the grounds that paragraph (1) encompassed all the communications referred to in paragraph (2). Another proposal was to apply the telephone option to all communications. It was pointed out that the instances referred to in paragraph (2) did not involve specific deadlines. Were such a two-stage procedure to be applied to communication involving deadlines, the question would arise whether both the telephone and the confirmation stages had to be completed by the deadline. It was agreed, however, that the reference to "telephone" could be deleted as it was covered by the term "any means of communication" and it was not necessary to single out any one system of communication.

Paragraph (3)

90. Differing views were expressed with regard to paragraph (3). Questions were raised as to whether its meaning was clear. A proposal was made for the deletion of paragraph (3). In support of that proposal it was stated that paragraph (3) had no relevance in a provision dealing with records. Another proposal was to relocate paragraph (3) to the chapter dealing with tendering proceedings. A prevailing view was that the provision should be retained in article 9 *bis* as it addressed concerns that contractors and suppliers lacking access to EDI should not suffer discrimination in the procurement proceedings. The Drafting Group was requested, however, to consider possible ways of making the paragraph clearer.

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Article 10

Rules concerning documentary evidence provided by contractors and suppliers

91. The Working Group considered the revised version of article 10 as contained in document A/CN.9/WG.V/WP.36 and found the article to be generally acceptable. It referred to the Drafting Group a suggestion that the word "when" should be replaced by the word "if", and that the word "may" should be replaced by the word "shall".

Article 10 *ter*

Record of procurement proceedings

92. The Working Group considered the revised version of article 10 *ter* as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

93. While the view was expressed that the provisions contained in article 10 *ter* were too detailed and excessively onerous for the procuring entity, the prevailing view was that the provisions achieved the right balance in view of the crucial role of records in fostering transparency and other objectives of the Model Law. It was further observed that records were essential for the effectiveness of review procedures.

94. The Working Group considered the question whether the Model Law should require disclosure of the portion of the record referred to in subparagraph (f *ter*). One possibility was that subparagraph (f *ter*), which concerned the grounds for restricting tendering proceedings under article 12 (2), should remain outside the disclosure requirement. According to that approach, the real significance of the record required in subparagraph (f *ter*) was considered to be for internal government audit. Such an approach would help to limit litigation. However, the Working Group favoured making subparagraph (f *ter*) subject to disclosure, as that would give meaning to the record requirement for the issue in question and foster transparency by enabling excluded contractors and suppliers to become aware of their exclusion, and to perhaps avoid exclusion in the future. That would also protect the public interest in the correct expenditure of public funds.

95. It was suggested that the word "grounds" in subparagraph (h) might be replaced with the words "grounds and circumstances" in order to align the subparagraph with similar text elsewhere in the Model Law.

Paragraphs (2) and (2 *bis*)

96. The Working Group considered again the desirability of retaining paragraphs (2) and (2 *bis*) in view of the limits contained therein on disclosure of the record of the procurement proceedings. The view was

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expressed that the extent of full, public disclosure could be usefully broadened to include the entire record with limited exceptions, such as the matters referred to in paragraphs (2 bis) (a) and (b). Supporters of the existing formulation stated that the paragraph properly allocated disclosure to the public at large and to participating contractors and suppliers. After deliberation, the Working Group decided to maintain paragraphs (2) and (2 bis) along their present lines.

Paragraph (2 ter)

97. The Working Group next considered the question of the exact point in time when the portion of the record referred to in subparagraph (f bis) of paragraph (1) should be made available pursuant to paragraph (2 ter). That portion of the record contained information on rejection of a tender, proposal or quotation on the grounds that the submitting contractor or supplier had offered an inducement to the procuring entity or any of its officials. A view was expressed that the time proposed in paragraph (2 ter) (i.e., after the termination of the procurement proceedings or the entry into force of the procurement contract was late) would not allow a contractor or supplier to meaningfully contest an allegation pursuant to article 10 quater. From two possible time limits - the time of the allegation of misconduct or the time of the decision to reject the tender, proposal or quotation - the Working Group chose the time of the decision to reject. During the discussion, the attention of the Working Group was drawn to the interplay between the Model Law and the criminal law of the enacting State. For example, the duty to disclose pursuant to paragraph (2 ter) may conflict with a prosecutor's desire to prevent disclosure due to an ongoing criminal investigation.

Paragraph (4)

98. The Working Group found paragraph (4) to be generally acceptable.

Article 10 quater

Inducements from contractors and suppliers

99. The Working Group considered the revised version of article 10 quater as contained in document A/CN.9/WG.V/WP.36.

100. In line with its decision with respect to article 10 ter (2 ter), it was agreed to indicate in article 10 quater the time when the procuring entity was required to inform the contractor or supplier concerned of an allegation under article 10 quater. Early disclosure would give an opportunity for the contractor or supplier to respond to the allegations. The proposal was adopted.

Article 12

Solicitation of tenders and of applications to prequalify

101. The Working Group considered the revised version of article 12 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

102. The Working Group noted that the reference at the end of the paragraph to publication of the notice of proposed procurement should refer instead to publication of the invitation to tender or of the invitation to prequalify in order to align the text with the terminology used elsewhere in the Model Law. Subject to that modification, paragraph (1) was found to be generally acceptable.

Paragraph (1 *bis*)

103. The Working Group found paragraph (1 *bis*) to be generally acceptable.

Paragraph (2)

104. The suggestion made in connection with article 7, namely, that the limited tendering procedure provided for in paragraph (2) should receive greater prominency in the Model Law was repeated, but again failed to attract support.

105. The Working Group next considered whether the manner in which the procuring entity selected contractors and suppliers from whom it was to solicit tenders could somehow be rendered more objective. It was suggested that the current formulation, which referred to the obligation to select a sufficient number of contractors and suppliers in order to ensure adequate competition, might be bolstered by referring to the obligation of the procuring entity to select "quality" firms or to make its selection on an objective basis. Other proposals included referring to the obligation of the procuring entity to select the contractors and suppliers to be approached "in accordance with the provisions" of the Model Law, and the consolidation of subparagraphs (c) and (a) of paragraph (2).

106. After deliberation, the Working Group decided to neither add language along the lines suggested nor to implement the other proposed changes. It was judged that in and of themselves terms such as "quality firms" and "objective" were not clear and would not provide any additional clarity, and that the second sentence of paragraph (2) (a) provided sufficient safeguards.

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Article 14

Contents of invitation to tender and invitation to prequalify

107. The Working Group considered the revised version of article 14 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

108. The Working Group declined to support a proposal to delete subparagraphs (d) and (d *bis*). It did agree, however, to add to subparagraph (d *bis*) a cross reference along the lines of "in accordance with article 8 *ter*". This was to avoid the implication that subparagraph (d *bis*) was the source of an independent right of the procuring entity to restrict participation in the tendering proceedings on the basis of nationality. The Working Group found the paragraph to be otherwise generally acceptable.

Paragraph (2)

109. The Working Group found paragraph (2) to be generally acceptable.

Article 17

Solicitation documents

110. The Working Group considered the revised version of article 17 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 19

Charge for solicitation documents

111. The Working Group considered the text of article 19 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 20

Rules concerning description of goods or construction in prequalification documents and solicitation documents; language of prequalification and solicitation documents

112. The Working Group considered the revised version of article 20 as contained in document A/CN.9/WG.V/WP.36.

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Paragraphs (1) and (1 *bis*)

113. It was noted that the Working Group, at its fourteenth session, had adopted the current wording of paragraph (1) with a view to referring simply to the prohibition of specifications and related requirements that created obstacles to participation by contractors or suppliers in the procurement proceedings, without specifying whether a subjective "intent" or an objective "effects" test was to be followed for the identification of those obstacles, leaving that matter to be determined under other laws. It was suggested that the reference to "obstacles to participation" might be further refined to refer to obstacles to "non-discriminatory", or "equal" participation. The Working Group found paragraph (1) to be generally acceptable.

114. As regards paragraph (1 *bis*), it was suggested that the principle that specifications and related requirements which created obstacles to foreign contractors and suppliers could appropriately be merged with the general provision contained in paragraph (1). The Working Group referred the matter to the Drafting Group.

Paragraphs (2), (3) and (4)

115. The Working Group found paragraphs (2), (3) and (4) to be generally acceptable.

Article 22

Clarifications and modifications of solicitation documents

116. The Working Group considered the revised version of article 22 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

117. A view was expressed that the second sentence of paragraph (1) put an excessive burden on the procuring entity by requiring that procuring entity to communicate to all contractors and suppliers to which it had sent the solicitation documents the responses it had made to any request for clarification of the solicitation documents. It was suggested that such responses should simply be placed at the disposal of the contractors upon request. The prevailing view, however, was that the contractors and suppliers had no independent way of finding out that a request for clarification had been made and that the Model Law should therefore provide equal access to information for all contractors and suppliers. Accordingly, the Working Group found paragraph (1) to be generally acceptable. It was agreed, however, that the paragraph should make it clear that, where the response by a procuring entity to a request for clarification was in the form of responses to a set of detailed questions submitted by a contractor or supplier, the questions would have to be communicated to all contractors and suppliers together with the responses.

Paragraphs (2) to (4)

118. The Working Group found the text of paragraphs (2) to (4) to be generally acceptable.

Article 23

Language of tenders

119. The Working Group considered the revised version of article 23 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 24

Submission of tenders

120. The Working Group considered the revised version of article 24 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

121. It was recalled that the Working Group, at its fourteenth session, had decided to replace the concept of "sufficient time" by the concept of "reasonable time" in the second sentence of paragraph (1). Questions remained at the current session as to that provision. One view was that the second sentence should be deleted since it might give rise to disputes as to the adequacy of the period of time allowed by the procuring entity for preparation of tenders. While support was expressed for the retention of a reference to the time for preparation of tenders, the Working Group decided that the notion of "reasonable time" was not universally used and would, in many countries, not be regarded as an objective criterion. The Working Group decided to delete the second sentence and to discuss in the commentary the need to provide adequate time for preparation of tenders.

Paragraph (2)

122. The Working Group found paragraph (2) to be generally acceptable.

Paragraph (2 bis)

123. The Working Group considered paragraph (2 bis) from the viewpoint of the extent to which the procuring entity should have the right, for its own purposes, to extend the deadline for submission of tenders. One view was that the procuring entity should have to obtain prior consent from all contractors and suppliers. Another view was that paragraph (2 bis) was of doubtful utility and could be deleted. It was pointed out that the possibility of not being able to make a timely submission could be regarded as an ordinary

business risk. Yet another view was that the procuring entity should always have the unilateral right to extend the deadline, since that would encourage competition without adversely affecting anyone. It was stated in that connection that the problem of expiry of the validity period of tender securities would not be insurmountable as new expiry dates could be arranged for the tender securities.

124. The Working Group noted that similar points had been raised at the previous session and found the approach taken in paragraph (2 bis) to be generally acceptable.

Paragraph (4)

125. The Working Group was agreed that the word "single" should be added before the words "sealed envelopes".

126. Differing views were expressed as to whether the second sentence of paragraph (4) should be retained. The sentence was aimed at accommodating the use of EDI for the submission of tenders.

127. One view was that the second sentence of paragraph (4) might put too much emphasis on the use of new communication techniques and might thereby have gone beyond merely enabling procuring entities to use EDI. It was said that the application of EDI to procurement, while already proven to be feasible for issuance of solicitation documents and invitations to tender, was more problematic with regard to submission of tenders. Concerns cited included disadvantages caused by the uneven availability of EDI, and limitations of EDI, at least at the current stage of technical development, with respect to a number of functions traditionally performed by paper-based tendering techniques. These included preventing disclosure to the procuring entity of the content of a tender prior to the deadline for the submission of tenders, for example through the use of sealed envelopes, how to handle opening of electronic tenders, and whether it would be possible to accept in a given proceeding a mix of written and electronic tenders. A view was expressed that prior to including more in the Model Law on EDI than an enabling provision, it would be useful to consider in greater detail the legal aspects of the application of EDI to procurement.

128. A countervailing view was that the second sentence was merely an enabling provision that did not impose the use of EDI upon those who could or would not use it. It was further urged that the orientation of the Model Law should be towards providing standards applicable to procurement employing rapidly emerging techniques, as well as to traditional techniques. It was also pointed out that the current formulation was intended to be aligned with similar language found in other UNCITRAL texts, such as the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, as well as with the work being undertaken by UNCITRAL with a view to facilitating the use of EDI.

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129. After deliberation, the Working Group decided to retain the writing requirement for submission of tenders and to delete the second sentence of paragraph (4), with its suggestion of paperless tenders. It was noted that the commentary would indicate that, notwithstanding the restriction in paragraph (4), States were free to elaborate paperless tendering proceedings, but that that would necessitate the examination of a number of issues (e.g., form of tender security in a paperless submission) and might require the elaboration of special regulations.

Paragraph (4 *bis*)

130. The Working Group found paragraph (4 *bis*) to be generally acceptable.

Article 25

Period of effectiveness of tenders; modification and withdrawal of tenders

131. The Working Group considered the text of article 25 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 26

Tender securities

132. The Working Group considered the revised version of article 26 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (new 1)

133. The Working Group noted that the definition contained in paragraph (new 1) would be returned to its former position in article 2 as a result of the decision reached earlier. As to the content of that definition, the Working Group considered a proposal to incorporate the term "indemnities" into the illustrative list of forms of tender securities. It was suggested that the new term might serve either as a replacement for or as a supplement to the reference to guarantees. However, owing to uncertainty as to the meaning of the term, and in view of the relative financial certainty offered by guarantees, as well as the prevalence of the use of guarantees, it was decided not to add the reference to indemnities. The Working Group did agree that the paragraph should refer to "bank guarantees" rather than simply to "guarantees", so as to identify more precisely the instrument in question amid the myriad instruments readers of the Model Law might call to mind when seeing simply the word "guarantees". It was felt that that would add clarity and would not suggest that only guarantees issued by banks were contemplated since the list was illustrative. The Working Group also noted a suggestion to replace the words "secure the obligation" by the words "secure the fulfilment of the obligation".

Paragraph (1)

134. A suggestion was made to refer in subparagraph (a bis) to the form and "substance" of the tender security rather than to its form and "terms". That suggestion was not regarded as adding clarity to the text. The Working Group noted that the explanatory footnote for subparagraph (b) would be deleted pursuant to the decision to confine guidance to legislatures to the commentary.

135. The Working Group next considered whether the provision in subparagraph (b bis) needed to make it clear that the procuring entity, despite having given a confirmation of the acceptability of a particular issuer, retained the right to reject a tender security upon discovery of the insolvency of the issuer. It was suggested to add words along the following lines:

> "... provided that the procuring entity may at any time after notification to the contractor or supplier reject the tender security if it discovers that the issuer of the tender security, or the confirming institution, has become insolvent or otherwise lacks creditworthiness."

136. The Working Group agreed to an addition of that nature since it was said to be helpful for some legal systems. It was recognized that in certain other legal systems such an explicit provision would not be necessary since the right of the procuring entity to reject in such cases would derive from general principles of law. It was also agreed that the commentary would explain that the language in question was optional.

137. Several comments were made as to the formulation of subparagraph (d). One observation was that the first sentence suggested a more significant degree of discretion on the part of the procuring entity to dictate the terms to be included in the tender security than was actually available, since the second sentence imposed a strict limitation that actually prescribed the procuring entity's range of choices for the terms of the tender security. It was suggested that the first sentence should be deleted. The Working Group agreed to add to subparagraph (d) an additional ground for the call of a tender security, namely, failure to comply with any other condition precedent to the signature of the procurement contract specified in the solicitation documents.

138. Another comment was that the chapeau of subparagraph (d) might be simplified and made more clear. However, the Working Group was unable to agree on a modified version of the chapeau, in particular because the existing formulation was seen as having the advantage of containing language that was not likely to be construed as referring specifically to either independent or to accessory guarantees. Support was also expressed for the retention of the first sentence on the ground that it made it clear that the procuring entity was to specify in the solicitation documents its requirement for the terms of the tender security. The Working Group requested the Drafting Group to consider whether it was sufficiently clear that independent guarantees were encompassed in the provision.

Paragraph (2)

139. The Working Group found paragraph (2) to be generally acceptable.

Article 27

Opening of tenders

140. The Working Group considered the revised version of article 27 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 28

Examination, evaluation and comparison of tenders

141. The Working Group considered the revised version of article 28 as contained in document A/CN.9/WG.V/WP.36.

142. The discussion revealed the need for the Drafting Group or the Secretariat to review the order in which the elements of the evaluation process were presented herein so as to ensure proper alignment of the sequence of article 28 with the actual order of actions in practice.

Paragraph (1)

143. The Working Group found subparagraph (a) to be generally acceptable.

144. A proposal was made to add a provision giving contractors and suppliers the right to correct factual and historical errors in their submissions. It was stated that that would help to ensure that the right of the procuring entity to correct purely arithmetic errors was not abused and to limit the rejection of tenders as unresponsive on the basis of minor factual and historic errors. The proposal was not accepted, as the Working Group was of the view that the matter was adequately addressed in particular by the procedure in subparagraph (a) for clarification of tenders. The Working Group also declined to support a proposal to delete as excessively onerous on the procuring entity the underlined language in subparagraph (b) imposing an obligation on the procuring entity to give notice of a correction to the submitting contractor or supplier. Accordingly, the Working Group found the present text of subparagraph (b) to be acceptable.

Paragraph (1 *bis*)

145. The Working Group referred to the Drafting Group a proposal that the word "may" in subparagraph (a) should be replaced by the word "shall" and that the word "only" in the same subparagraph should be deleted so as to clarify the meaning of paragraph (1 *bis*).

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146. Various suggestions were made aimed at clarifying the meaning of the expression "minor deviations that do not materially alter" contained in subparagraph (b). One proposal was to add language to the effect that "a deviation is considered material if it alters in any substantial way the quality, quantity or time of performance of the contract or which limits the contractor's or supplier's rights or obligations under the procurement contract". In support of the proposal it was stated that it was necessary to clarify the term "materially" as it was vague and might lead to abuse and to frivolous grounds being used to disqualify tenders on the grounds that they were unresponsive. In opposition it was stated that the proposed wording did not clarify what might constitute a minor deviation any further than the present text as the word "substantial" was equally vague. The proposal was not accepted. Other proposals that did not get broad support included treatment of minor deviations under the rubric of clarifications under paragraph (1), and the combination of subparagraph (a) and the second sentence of subparagraph (b) so as to include in the definition of "minor deviations" the notion of quantification. It appeared to be difficult to go beyond what was in the current draft, in particular since the manner of application of the Model Law in any given case would depend to a significant degree on the disposition and approach of the procurement officer in any given case.

147. Another proposal was to insert the words "or if it contains factual errors or oversights which are capable of being corrected without a change of substance in the tender" after the first sentence in subparagraph (b). It was stated that that would ensure that tenders were not considered as unresponsive for containing factual errors or oversights which could easily be rectified. The proposal was accepted and referred to the Drafting Group. It was suggested that the word "characteristics" should be replaced by the words "any characteristics".

148. It was agreed that the space left vacant in subparagraph (d) by virtue of an earlier deletion should now be occupied by a reference to rejection or non-acceptance of tenders stained by inducements prohibited under article 10 quater. The proposal was accepted.

Paragraph (7)

149. It was noted that the reference to rejection in subparagraph (a) needed to be modified in view of the Working Group's decision, as reflected in paragraph (2), to limit the use of the word "rejection".

150. It was agreed that the reference in the *chapeau* of subparagraph (c) to the solicitation documents was superfluous and should be deleted. The Working Group noted that the matter was already covered in article 17 (e *bis*).

151. A question was posed as to the list in subparagraph (d) (iii) illustrating the types of factors that might be taken into account in determining the lowest evaluated tender. The concern here was that many of the items listed involved a high degree of subjectivity. However, the prevailing view was that the thrust and basic content of

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subparagraph (d) (iii) were satisfactory though further refinement would not be excluded. Subject to the modification agreed upon, the Working Group found paragraph (7) to be generally acceptable.

152. A proposal was made to delete the reference at the beginning of subparagraph (e) to authorization by the procurement regulations of the use of a margin of reference. The rationale behind that suggestion was the belief that the requirement of authorization by the procurement regulations was implicit in the final portion of subparagraph (e) which required the margin of preference to be calculated in accordance with the procurement regulations. Another proposal, going to the substance of the matter, was that any authoritative role for the procurement regulations with respect to margins of preferences should be abandoned so as not to tie the hands of the procuring entity and not to disadvantage enacting States that did elaborate procurement regulations. However, those proposals encountered opposition. It was felt that the requirement of authorization by the procurement regulations was an important element for transparency that should be retained and that required adequate emphasis in the Model Law.

153. It was suggested that subparagraph (e) should include a requirement for the preparation of a record in accordance with article 10 ter that would be subject to disclosure.

154. A proposal was made to add to article 17 (1) (e bis) a reference to paragraph (7) (e).

Paragraphs (8), (8 bis), (8 ter) and (9)

155. The Working Group found paragraphs (8), (8 bis), (8 ter) and (9) to be generally acceptable.

Article 29

Rejection of all tenders

156. The Working Group considered the revised version of article 29 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 30

Negotiations with contractors and suppliers

157. The Working Group considered the text of article 30 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

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Article 32

Acceptance of tender and entry into force of procurement contract

158. The Working Group considered the revised version of article 32 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

159. The Working Group found paragraph (1) to be generally acceptable.

Paragraphs (2) and (3)

160. A view was expressed that the notion of the entry into force of the procurement contract upon dispatch of a notice of acceptance of the tender should give way to the notion of entry into force upon the conclusion of a procurement contract. It was stated that, under paragraph (3), tenders might be modified one or more times and that, if the contract were to enter into force upon dispatch of the notice of acceptance of the tender, it might be uncertain what the terms of the accepted tender were. Providing that the contract entered into force only upon the signature of a written contract document would eliminate that uncertainty. However, the Working Group affirmed the decision made at its previous sessions that the Model Law should present options with respect to the manner of entry into force of the procurement contract reflecting differences in national practice.

161. As to whether, in paragraphs (2) and (3), reference should be made to the "receipt" of the notice of acceptance of the tender, rather than to its dispatch, the Working Group recalled its previous discussions. It was noted that the "receipt" approach was used in the United Nations Sales Convention, article 18 (2). However, the "dispatch" approach had been considered to be more appropriate in the particular circumstances of procurement. In essence, what was at stake was the risk of a delay or a failure in the transmission of the notice. In order to bind the contractor or supplier to a procurement contract or to obligate it to sign a written procurement contract, the procuring entity had to give the notice while the tender was in force and effect. Under the "receipt" approach, if the notice was properly transmitted or conveyed to a transmitting authority by the procuring entity, but the transmission was delayed, lost or misdirected owing to no fault of the procuring entity, so that the notice was not received by the contractor or supplier before the expiry of the period of effectiveness of its tender, the procuring entity would lose its right to bind or obligate the contractor or supplier. Under the "dispatch" theory, that right of the procuring entity was preserved. In the event of a delay, loss or misdirection of the notice, the contractor or supplier might not learn before the expiration of the period of effectiveness of its tender that the tender had been accepted; but in most cases, that consequence would be less severe than the loss of the right of the procuring entity to bind the contractor or supplier. Accordingly, the Working Group affirmed its decision that the reference should be to the "dispatch" of the notice.

Paragraph (3 bis)

162. It was suggested that the requirement that the decision should be made within a reasonable time after the dispatch of the notice should be deleted. Such a requirement might be considered as unnecessarily restrictive, as well as superfluous, since, in the case of excessive delay, the validity period of the tender would in any case lapse. It was also suggested that the words "or, as the case may be, be executed" in the second sentence should be deleted, since that language barred signature of a procurement contract prior to the issuance of the approval, if required. The modification was intended to accommodate the practice in a number of countries of not considering requests for final approvals until after signature of the procurement contract.

163. Yet another suggestion was to delete both the remainder of paragraph (3 bis) and the first sentence of paragraph (3 ter), on the grounds that the rules contained in those provisions already resulted from the limitation inherent in the period of validity of the tenders. The prevailing view, however, was that those provisions, while they could be simplified, should be maintained. With a view to such simplification, the Working Group adopted the following consolidation of paragraph (3 bis) and the first sentence of paragraph (3 ter):

> "Where the procurement contract is required to be approved by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated amount of time following the dispatch of the notice of acceptance of the tender that will be required to obtain the approval."

Paragraphs (3 ter) to (6)

164. The Working Group found paragraphs (3 ter) to (6) to be generally acceptable.

New article 33 bis

Conditions for use of two-stage tendering

165. The Working Group considered the revised text of new article 33 bis as contained in document A/CN.9/WG.V/WP.36.

166. The Working Group considered the conditions for use of two-stage tendering in the light of its decision, taken in connection with article 7, that, to the extent possible, the conditions for use of two-stage tendering, request for proposals and competitive negotiation should be assimilated. In that regard, the Working Group affirmed the condition in paragraph (a), which referred to cases in which the procuring entity for one reason or another was not in a position to formulate specifications to the level of detail required for tendering proceedings.

167. Beyond the case of incomplete specifications, the Working Group considered whether other conditions for use, in particular those set forth in new article 34, should be made applicable to two-stage tendering. It was agreed that two-stage tendering should be available for the conditions set forth in new article 34 (c), (d) and (e). It was agreed, at the same time, that two-stage tendering was not a method of procurement suited to the sole ground of urgency and that therefore the provision in new article 34 (b) would not apply to two-stage tendering.

168. As it had in connection with the discussion of article 7, the question arose as to whether the conditions for use of the various methods would be presented in one article or section in the Model Law. The Working Group decided to take the question up after it had completed its review of the articles concerning the methods of procurement.

169. Subject to the expansion of the conditions for use of two-stage tendering as described above, the Working Group found new article 33 bis to be generally acceptable.

Article 33 bis

Procedures for two-stage tendering

170. The Working Group considered the revised version of article 33 bis as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 33 ter

Conditions for use of request for proposals

171. The Working Group noted that, as had been agreed, the condition in subparagraph (a) would be applicable to request for proposals, as well as to two-stage tendering and competitive negotiation. It was also agreed that the conditions referred to in subparagraphs (c), (d) and (e) of new article 34 would also be applicable to request for proposals. As to the non-catastrophic urgency cases referred to in subparagraph (b) of new article 34, the Working Group noted a concern that if such circumstances were not covered in request for proposals, enacting States that incorporated request for proposals would not have a procurement method designed to deal with non-catastrophic urgency. It was suggested that the problem might be solved by including the condition in new article 34 (b) among the conditions for use of request for proposals. However, objections were raised to that on the grounds that request for proposals was not a method suited for cases of urgency. The Working Group noted that possible solutions might lie in expanding the urgency ground for use of single-source procurement to cover cases of non-catastrophic urgency. The Working Group decided to consider further the matter in connection with its review of the conditions for use of competitive negotiation and single-source procurement.

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172. The Working Group agreed to remove from article 33 ter (a), (b) and (c) the references found therein to a number of procedures to be followed in conducting request-for-proposals proceedings. Those references, which concerned the number of contractors and suppliers to be included in the competition and the manner of selection of the winning proposal, had been included in the article on conditions for use of request for proposals in part to help to distinguish that method of procurement from two-stage tendering and competitive negotiation. It was agreed that now that the problem of overlap in the conditions for use of those methods had been addressed, that rationale for the inclusion of procedures in the article on conditions for use had faded away and they should be deleted from article 33 ter. However, the Working Group affirmed the importance of those procedures and requested the Drafting Group to ensure that they were adequately covered in article 34 quater.

Article 33 quater

Procedures for request for proposals

173. The Working Group considered the revised version of article 33 quater as contained in document A/CN.9/WG.V/WP.36.

Paragraph (new 1)

174. The Working Group decided that paragraph (new 1) should be aligned with the formulation in article 12 (1 bis), used therein to require the publication in newspapers and trade journals of the invitation to tender or to prequalify. It was also agreed that the words "economy or efficiency" should be replaced by the words "economy and efficiency". The Working Group found paragraph (new 1) to be otherwise generally acceptable.

Paragraphs (1) to (6)

175. The Working Group found paragraphs (1) to (6) to be generally acceptable.

Paragraph (7)

176. The Working Group requested the Drafting Group to review the formulation of subparagraph (a) so as to ensure that it would not imply that all the evaluation factors had to be reproduced in every modification of the request for proposals. A suggestion was made that the addition of the word "relevant" before the word "modification" would remedy the problem. It was also observed that it should be made clear that subparagraph (a) was not a source of any additional obligation with respect to the disclosure of factors beyond that already stated in paragraph (2).

177. The Working Group recalled that at the fourteenth session it had taken the view that the procedures set forth in subparagraphs (b) and (c) could be considered as optional or illustrative, and, at the current session, it considered whether to retain or to delete those provisions. In considering

the matter, the Working Group noted that the two provisions had been added in order to render request-for-proposals proceedings more disciplined. As no objections were raised to the retention of the provisions, the Working Group decided that they should be retained, and not merely in an optional or illustrative role, but rather as mandatory.

Paragraph (8)

178. The Working Group agreed to the replacement of the words "The award" at the beginning of the paragraph by the words "Any award" so as to take account of the possibility that the procuring entity would not accept any of the proposals submitted to it.

179. The view was expressed that paragraph (8) should make it clear that the procuring entity was to award the procurement contract only to the contractor or supplier that submitted the proposal that best met the needs of the procuring entity as determined in accordance with the factors for evaluating the proposals.

New article 34

Conditions for use of competitive negotiation

180. The Working Group considered the revised version of new article 34 as contained in document A/CN.9/WG.V/WP.36.

181. The Working Group generally agreed to the retention of the existing conditions for use of competitive negotiation. At that point it also considered further which procurement methods should cover cases of urgency, and how the urgency condition for use might be formulated for the methods to which it would relate. The Working Group agreed that the catastrophic-urgency condition in article 35 (new 1) (c) should be retained as a ground for the use of single-source procurement and that the unforeseeable urgency cases covered in new article 34 (b) should be retained as a ground for the use of competitive negotiation.

182. Concerning the gap with regard to cases of non-catastrophic urgency that the scheme would leave in States that did not incorporate competitive negotiation, the Working Group attempted to find a solution by giving the procuring entity the discretion and flexibility needed in order to select the most appropriate procurement method in cases of urgency. It was agreed that that could be done by including in new article 34 and in article 35 parallel conditions for cases of urgency. Under that approach, non-catastrophic urgency would remain as a condition for use of competitive negotiation; in addition, use of competitive negotiation would also be authorized for cases of catastrophic urgency. Similarly, single-source procurement would be available both for cases of catastrophic urgency as well as for urgency not involving catastrophic causes. That approach would provide States that did not incorporate competitive negotiation with a method of procurement to cover cases of non-catastrophic urgency.

183. As regards the catastrophic urgency case already covered in article 35 (new 1) (c) and now to be added to new article 34, a suggestion was made that the provision might be reformulated so that it would not refer specifically to catastrophic circumstances but instead would refer to a compelling and urgent public interest that made it impossible or imprudent for the procuring entity to deal with more than one contractor or supplier.

184. The attention of the Working Group was drawn to the added significance of the record requirement in article 7 (5) under such a more flexible, discretionary scheme. A suggestion to restrict the availability of competitive negotiation in cases of urgency by providing that the competitive negotiation proceedings would have to expedite the conclusion of a procurement contract was regarded as unworkable as the procuring entity could not be expected to know in advance whether competitive negotiation rather than some other method would be sure to result in a more expedited proceeding.

185. As regards the condition in subparagraph (e), questions were raised as to the extent to which research contracts, even those leading to the purchase of a prototype, could be treated under the rubric of procurement of goods and construction. The Working Group was of the view that such research contracts should be contemplated by the conditions for use of competitive negotiation. At the same time, it was noted that article 35 (new 1) (e) set forth an identical condition for the use of single-source procurement. It was decided that the overlap was advantageous in that it would give to the procuring entity the flexibility to select a method of procurement that best fit the circumstances of a given case. Accordingly, it was decided to retain research contracts leading to the procurement of a prototype as a condition for use for each of the two methods. In that connection, emphasis was again placed on the importance of the record requirement in article 7 (5).

Article 34

Procedures for competitive negotiation

186. The Working Group considered the revised version of article 34 as contained in document A/CN.9/WG.V/WP.36.

187. A view was expressed that article 34 contained very few procedures regulating the conduct of competitive negotiation proceedings, as compared, in particular, to the provisions on request for proposals. In response, it was pointed out that the method of competitive negotiation was often adopted because the procuring entity could not determine in advance all of the criteria to be used.

188. The Working Group found article 34 to be generally acceptable.

New article 34 *bis*

Conditions for use of request for quotations

189. The Working Group considered the revised version of new article 34 *bis* as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 34 *bis*

Procedures for request for quotations

190. The Working Group considered the revised version of article 34 *bis* as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 35

Single-source procurement

191. The Working Group considered the revised version of article 35 as contained in document A/CN.9/WG.V/WP.36.

192. The Working Group reaffirmed its decision taken during its consideration of new article 34 that a provision along the lines of new article 34 (b) should be transposed into article 35.

193. The Working Group also affirmed that it was appropriate for article 35 (new 1) (e), which permitted the procuring entity to use single-source procurement for research contracts, to be retained. The Working Group found article 35 to be generally acceptable.

194. Having completed its review of the conditions for use of the various methods of procurement, the Working Group next considered the drafting matter of the location of the conditions for use. In particular, the question was raised as to whether all the conditions for use, including those for single-source procurement and request for quotations, should be moved into article 7, or into a cluster of articles near article 7, or whether only the conditions for use of two-stage tendering, request for proposals and competitive negotiations should be assembled in one place. A related question was whether the urgency conditions applicable to single source and competitive negotiations should be in article 7. Another question concerned possible consolidation of references to the approval requirement governing resort to the methods of procurement other than tendering.

195. While sympathy was expressed for the advantages of consolidating all the conditions for use in article 7, concern was voiced that were all the conditions to be included in article 7, the article would be excessively long and apparently rather complex.

196. Another suggestion, which attracted the support of the Working Group and was referred to the Drafting Group, was that all common conditions should be dealt with in article 7, and that conditions specific to a particular method should be dealt with in individual articles relating to those methods. Under such a scheme, conditions for the use of single source and request for quotations would essentially be handled separately as they were specific to those methods. A parallel suggestion was that article 7 should be moved from chapter 1, which dealt with a variety of general provisions, into a separate chapter dealing with procurement methods and their conditions of use. Within that context the conditions for the use of single source and request for quotations could be handled separately. The Working Group noted that any consolidation of the conditions for use of all the methods would appear to leave the Model Law without an article specifically devoted to single-source procurement, as there were no procedures spelled out for single-source procurement. It was suggested that that might be remedied by retaining in article 35 language patterned on paragraph (new 1).

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Article 36

Right to review

197. The Working Group considered the revised version of article 36 as contained in document A/CN.9/WG.V/WP.36.

198. The Working Group decided to retain the asterisk footnote to the title of chapter IV, on review. It was felt that an exception to the decision not to have footnotes on the face of the Model Law was warranted by the significance of the information contained in the footnote. That footnote explained the difference in the character of the provisions on review, namely, that some States might wish to use those provisions only to measure the adequacy of existing review procedures. The Working Group agreed that the special nature of chapter IV should also be discussed in greater detail in the commentary.

199. As to the formulation of the footnote, it was agreed that reference should be made to "constitutional and other considerations", rather than merely to "constitutional considerations". That modification was aimed at encompassing obstacles to the incorporation of chapter IV other than of a constitutional nature.

Paragraph (1)

200. The concern was expressed that the rule of standing, which referred to "any contractor or supplier that has an interest in obtaining a procurement contract", might overly broaden the scope of the provision. It was also stated that that could spawn uncertainty and unjustified litigation and run counter to the decision taken by the Working Group in article 2 to limit the use of the term "contractor or supplier" to exclude contractors and suppliers with insufficient proximity in any given context (see para. 30). In view of the above concern, it was suggested to rephrase the paragraph as follows:

> "(1) Subject to paragraph (2), any contractor or supplier claiming to have suffered loss or injury because of a breach of a duty imposed by this Law may seek review of the act, decision or procedure in accordance with articles 37 to 41."

201. The view was expressed, however, that the suggested words "claiming to have suffered loss or injury" might still open too widely the right for contractors or suppliers to seek review, a right which should be granted only to those contractors or suppliers who had actually suffered loss or injury. It was pointed out that until the facts had been adjudicated, a petition for review could only be said to "claim" injury, and, moreover, even if injury was suffered and not merely risked, at the time when review might be sought, precise information as to the extent of the loss actually suffered might not be available. The Working Group also affirmed that the right to seek review should not be limited to *ex post facto* remedies but should also be open to contractors and suppliers that claimed to risk suffering loss or injury.

202. The view was expressed that the reference to article 40 was inappropriate since that article dealt with judicial proceedings. However, it was generally felt that, while article 36 was not geared mainly to judicial review, administrative review might also be of some relevance to court proceedings.

Paragraph (2)

203. Notwithstanding that a view was expressed that the reference to "domestic suppliers or contractors" should be retained, it was generally agreed that the reference should be deleted from subparagraph (b) to ensure consistency with article 8 *ter*.

204. The view was expressed that subparagraph (c) should be expanded to refer also to two-stage tendering and to requests for proposals.

205. The Working Group reaffirmed that the distinction between duty and discretion and, when a duty was imposed, the purpose of that duty, should serve as the basis for distinguishing between provisions that gave rise to a private right to review and those that did not. According to that approach, provisions obligating the procuring entity to exercise discretion would not give rise to private remedies, except to the extent that the procuring entity failed to exercise discretion at all or exercised it in an arbitrary fashion. Furthermore, there were some provisions that, as outlined in paragraph (2), involved the procuring entity's discretion and were aimed at the general public interest and therefore were not to be regarded as establishing any private rights and that in no case should give rise to a private remedy. However, a concern was expressed that, as presently drafted, article 36 would not exempt from review all the cases of exercise of discretion that merited exemption. Accordingly, the following proposal was made:

> "(f) any other decision where the procuring entity is exercising a discretion afforded to it by this Law."

206. The Working Group was hesitant to adopt the proposal. It was observed that, should such a clause be included, little would remain in the way of remedies, since so much of what the procuring entity did under the law involved the exercise of some degree of discretion. It was said that such a situation would sharply curtail the effectiveness of the review procedures as a tool for enforcement of the Model Law. The Working Group agreed that any such provision would have to be drafted with caution so as to address those concerns.

Article 37

Review by procuring entity or by approving authority

207. The Working Group considered the revised version of article 37 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

208. The Working Group found paragraph (1) to be generally acceptable.

209. It was agreed that the commentary should refer to the need for enacting States to elaborate regulations dealing with the detailed procedural requirements that should be met by a supplier or contractor in order to initiate the review proceedings. For example, such regulations could clarify whether a succinct statement made by telex, with evidence to be submitted later, would be regarded as sufficient.

Paragraph (2)

210. Concerns were expressed regarding the time periods and deadlines contained in article 37 and the subsequent articles. One concern was that the reference to "days" needed to be made consistent. It was pointed out that the reference to "days" in paragraph (2) might be inconsistent with the definition of other time periods, for example in paragraph (4), which relied on the notion of "working days", and that the same formulation should be used throughout. The view was expressed that the notion of "working day" could be retained provided that it was made clear that it referred to "working days" in the country of the procuring entity. However, it was pointed out that, in view of the variable contents of the notion in different countries, any reference to "working days" should be avoided and that time periods, throughout the Model Law, could be expressed with more certainty by the use of the term "calendar days". It was also pointed out that, since most States had enacted interpretation acts that would provide definitions of a "day" or "working day", it might be possible not to deal with the matter in the Model Law to such a degree of specificity.

211. Another concern was that the time periods and deadlines set forth in article 37 and the following provisions might be too short, to the point of hindering recourse to meaningful review. The Working Group did not favour leaving the matter open in the Model Law. It was felt desirable to indicate the preferred period of time in the Model Law. One suggestion was that the commentary should indicate that the dates set in the Model Law were norms and should discuss solutions to problems such as the effect of holidays.

212. Accordingly, the Working Group agreed that the 10-day period set forth for the procuring entity to entertain a complaint was too short, particularly in view of the international nature of the proceedings, and that it should be extended to 20 days.

213. It was also agreed that discretion should be afforded to the head of the procuring entity to entertain a complaint that had been submitted after expiration of the 20-day period. It was suggested that that could be done by replacing the words "shall not" by the words "need not".

Paragraph (3)

214. The Working Group found paragraph (3) to be generally acceptable.

Paragraph (4)

215. Subject to the increase of the period from 20 days to 30 days, the Working Group found paragraph (4) to be generally acceptable.

Paragraph (5)

216. While doubts were expressed as to the necessity of the provision in view of the availability of judicial recourse in most legal systems, the Working Group noted that a provision such as paragraph (5) on the administrative and judicial consequences of a failure by an administrative authority to act within a specific time period would be regarded as essential in many countries.

217. It was also noted that the reference to the "person" submitting a complaint needed to be changed to a reference to a "contractor or supplier" in line with the decision at an earlier session in connection with article 36 to limit the availability of review to contractors and suppliers. Paragraph (5) was found to be otherwise generally acceptable.

Paragraph (6)

218. The Working Group found paragraph (6) to be generally acceptable.

Article 38

Administrative review

219. The Working Group considered the revised version of article 38 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

220. As regards subparagraph (a), the view was expressed that the reference to the time when the contractor or supplier "became aware of the circumstances giving rise to the complaint" should be replaced by a mention of the time when the contractor or supplier became aware of its right to bring a complaint. That proposal was intended to address the situation where the right to review under article 37 would no longer be available to the contractor or supplier because of the entry into force of the procurement contract. It was generally agreed that subparagraph (a), or another provision in the Model Law, needed to address that situation, since the underlying principle was that a claimant should have access to article 38 review if article 37 review became unavailable.

221. As regards subparagraph (c), in accordance with the decision taken with respect to time periods in article 37, it was agreed to increase the 10-day period in subparagraph (c) to a period of 20 days. While a concern was expressed that the formulation of the subparagraph should refer to cases in which a contractor or supplier had actually been adversely affected by a decision of the head of the procuring entity, it was generally agreed that, for reasons expressed in the context of article 36 (see para. 201), the mention of a "claim" of injury of the contractor or supplier had to be maintained. It was noted that similar changes would be applicable to subparagraphs (a) and (b).

222. Subject to the above changes, the Working Group found paragraph (1) to be generally acceptable.

Paragraph (1 *bis*)

223. The Working Group found paragraph (1 *bis*) to be generally acceptable.

Paragraph (2)

224. It was observed that, while paragraph (1) established certain time-limits for the commencement of administrative review that were linked to the point of time when the complainant became aware of the circumstances in question, the Model Law did not provide any absolute limitation period within which the administrative body should grant a remedy or dismiss the complaint. The view was expressed that, as article 38 did not displace the jurisdiction of the courts, that should be left to other national law, particularly in view of the fact that such administrative proceedings, in certain countries, might take the form of quasi-judicial proceedings involving hearings or other lengthy procedures. However, the prevailing view was that an overall period of 30 calendar days should be imposed on the administrative body. It was noted that the difficulties that might arise in some countries with such a limitation could be overcome, in particular because of the optional nature of the article.

225. It was noted that the reference in subparagraph (c) to the "person" claiming to be adversely affected would be modified to refer to a "contractor or supplier".

Paragraph (3)

226. The Working Group found paragraph (3) to be generally acceptable.

Paragraph (4)

227. The Working Group found paragraph (4) to be generally acceptable. A view was expressed, however, that the reference to the commencement of an action under article 40 was not appropriate since the review provisions did not purport to deal with questions of judicial procedure.

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Article 39

Certain rules applicable to review proceedings under article 37 [and article 38]

228. The Working Group considered the revised version of article 39 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

229. A view was expressed that the paragraph put an excessive burden on the procuring entity and that the obligation to notify all contractors and suppliers participating in the procurement proceedings of the submission of the complaint and of its substance should be deleted. That view failed to attract support and the Working Group found paragraph (1) to be generally acceptable.

Paragraph (2)

230. The Working Group decided to add a provision to the effect that a contractor or supplier that failed to participate in the review proceedings would be barred from subsequently raising the same type of claim.

231. A view was expressed that the standard set forth in paragraph (2) to determine which contractors and suppliers would be admitted, which referred to any contractor or supplier whose interests were or "could be affected", was too vague and should be restricted to cases in which the interests of a contractor or supplier had actually been affected. It was suggested that such a limitation would help to ensure that review proceedings did not assume unmanageable proportions and unduly disrupt the procurement proceedings. The prevailing view, however, was that the existing formulation was adequate, particularly in view of the discretion remaining in the hands of the review body to determine whether a given contractor or supplier met the admission test. It was also felt that the possibility of broader participation should not be unduly restricted since it was in the interest of the procuring entity to have complaints aired and information brought to its attention as early as possible.

232. The view was expressed that paragraph (2) was not clear as to whether governmental authorities, in particular approving authorities, were allowed to participate in the review proceedings. It was generally agreed in that regard that the "right to participate" should expressly be extended to such authorities.

Paragraph (3)

233. It was generally agreed that the reference to a five-day period should be replaced by a reference to a seven-day period and that the text should expressly mention that the period was to run from the date of issuance of the decision by the head of the procuring entity.

234. A view was expressed that the obligation of the head of the reviewing body to provide any contractor or supplier or governmental authority that had participated in the review proceedings with a copy of the decision was excessively burdensome. The prevailing view, however, was that the obligation should be maintained.

Article 40

Judicial review

235. The Working Group considered the revised version of article 40 as contained in document A/CN.9/WG.V/WP.36.

236. A question was raised as to the need for article 40, since court jurisdiction would presumably be assured under relevant statutes.

237. It was observed that it should be made clear in the commentary that the purpose of the article was not to limit or to displace the rights to judicial review that might be available under other applicable law. An important aim, rather, was to express a recommendation and to provide guidance to those countries where appropriate judicial review mechanisms would not be available outside the Model Law. It was noted, however, that the assumption was that, under the Model Law, administrative recourse would be exhausted before judicial review could take place.

238. It was generally agreed that the current text should be refined to make it clear that an appeal could be lodged not only against a decision reached by a review body, but also against a failure by such a review body to reach a decision within a given period of time.

239. A concern was expressed as to whether article 40 would allow a procuring entity to seek judicial review of the decision of an administrative body. It was observed that the reference to article 36, which established the right for contractors and suppliers to seek review, might unduly suggest that only contractors and suppliers had a right to judicial review. It was agreed that the drafting of article 40 should be refined so as not to suggest that procuring entities were precluded from seeking judicial review of decisions reached at lower levels of the review process. The following wording was adopted:

> "The [insert name(s) of court(s)] has jurisdiction in respect of petitions for judicial review of decisions reached (or not taken within the time prescribed) by review bodies under articles 37 and 38."

Article 41

Suspension of procurement proceedings

240. The Working Group considered the revised version of article 41 as contained in document A/CN.9/WG.V/WP.36.

241. It was proposed that article 41 should be placed before article 40, which dealt with judicial review. It was observed that this would clarify the fact that article 41 related to proceedings under article 37 and article 38, rather than to judicial proceedings. It was noted that its present placement was inappropriate as article 41 had nothing to do with judicial review. The proposal was accepted.

Paragraph (1)

242. A view was expressed that there should be no automatic suspension and that the procuring entity should have the discretion as to whether or not to suspend procurement proceedings in the event of a complaint. However, the Working Group reaffirmed its decision, taken at its fourteenth session, that article 41 should provide for mandatory suspension, on the condition that the complaint met certain criteria specified in the Model Law.

243. A suggestion was made that the provision should be modified to state that the suspension would be dependent upon the procuring entity "satisfying itself" that the conditions for the suspension had been met. Objections were raised to the proposal on the ground that such language would run counter to the decision that the application for a suspension should not involve an adversarial or an evidentiary process, but rather should be an ex parte process based on the affirmation by the complainant of certain circumstances. It was also suggested that the availability of an override of the suspension under paragraph (4) obviated the need for any further limitations. At the same time, it was recognized that, even in the context of ex parte allegations, the procuring entity should be enabled to look on the face of the complaint and reject frivolous complaints. The Working Group agreed to reformulate paragraph (1) so as to allow a procuring entity to satisfy itself that the complaint was not frivolous before a suspension was applied.

244. Several suggestions were made for the consideration of the drafting group as to the appropriate wording to be used to reflect the above understanding. One formulation was that the allegations should be such that, "if proven, would demonstrate that the contractor or supplier will suffer irreparable injury in the absence of a suspension". The proposal did not generate significant support. The Working Group favoured more a proposal that the allegations of the contractor or supplier should "satisfy the review body that the contractor or supplier will suffer irreparable injury in the absence of a suspension and that the complaint is not frivolous". The Working Group referred those proposals to the drafting group.

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245. The Working Group considered the question of the length of the time of the suspension. A view was expressed that the period of five days provided for in paragraph (1) was too short a period of time. It was suggested that a more appropriate time would be 30 days, as this would allow the review body sufficient time to make a decision on the complaint before it. It was also suggested that that would be in line with the time periods to which the Working Group had agreed with respect to articles 37 and 38, in particular since it would appear illogical to have 30 days to take a decision, but only 5 days for the minimum duration of a suspension. In opposition to the proposal it was pointed out that the procuring entity under paragraph (3) had the power to extend the suspension period in order to preserve the rights of the contractor or supplier submitting the complaint or commencing the action. It was further stated that having an initial very short period of suspension would limit disruption of procurement proceedings due to unwarranted suspensions, while at the same time accomplishing the essential purpose of freezing the status quo while the review body obtained an impression of the complaint and determined whether any longer suspension was merited. That approach was said to maintain an appropriate balance between the interests of the procuring entity and those of contractors and suppliers.

246. After deliberation, the Working Group decided to keep the initial period of suspension at seven days as provided for in paragraph (1). It was noted that the application of a suspension might affect time-limits in the procurement proceedings, such as the deadline for the submission of tenders, and may raise the question of the validity of tender securities. As regards tender securities, it was noted that a contractor or supplier could not be required to extend its tender security as a result of the suspension of procurement proceedings, but would rather have to be allowed to withdraw from the procurement proceedings without penalty.

247. Several drafting suggestions were made with respect to paragraph (1). One was to replace the words "article 37 or 38" by the words "article 37 and/or 38". Another was to replace the words "suspends procurement proceedings" by the words "suspend procurement proceedings and deadlines" in order to clarify the meaning of suspension of the procurement proceedings. The suggestions were referred to the drafting group. The Working Group affirmed the use of the word "declaration", rather than the word "affidavit", as the latter term was not universally known.

Paragraph (2)

248. It was proposed that the words "upon issuance of a notice of acceptance" should be deleted. In support of the proposal it was stated that paragraph (2) should apply to both the situation where the issuance of the notice triggered the entry into force of a procurement contract and where the procurement contract did not enter into force until after actual signature of a contract. It was noted that article 32 (5) would require paragraph (2) to apply to both situations. The proposal was accepted.

249. The Working Group considered whether paragraph (2) should place an overall limitation on the duration of suspension. It was proposed that there should be an overall limit of 30 days. In support of the proposal it was stated that without a limit, the duration of suspension might become unwieldy, in particular with respect to proceedings before administrative bodies. In opposition to the proposal it was stated that a limitation period would leave a contractor or supplier who had submitted a complaint without a remedy should an administrative body fail to make a determination within the overall limitation of 30 days. It was noted, however, that such a contractor or supplier would still presumably have judicial remedies. Subject to possible further consideration, the proposal to place an overall cap of 30 days was accepted.

Paragraph (3)

250. The Working Group found paragraph (3) to be generally acceptable.

Paragraph (4)

251. It was proposed that paragraph (4) should require inclusion in the record of information concerning a determination by the procuring entity that a complaint under paragraph (1) should not trigger automatic suspension. The proposal was accepted.

II. REPORT OF THE DRAFTING GROUP

252. The Working Group reviewed the draft articles of the Model Law as revised by the drafting group. At the conclusion of its deliberations on the draft articles of the Model Law, the Working Group adopted the text of the draft Model Law as contained in the annex to the present report.

III. FUTURE WORK

253. The Working Group requested the Secretariat to circulate the text of the draft Model Law to Governments and interested organizations for comments. It was noted that the text of the Model Law, together with a compilation of comments by Governments and interested organizations, would be placed before the Commission at its twenty-sixth session for final review and adoption.

254. The Working Group affirmed its earlier decision that a commentary giving guidance to legislatures enacting the Model Law should be prepared. As to the timing and method of preparation of the commentary, the Working Group affirmed the decision at its previous session that, upon the preparation of the draft commentary by the Secretariat, it would convene a small and informal ad hoc working party of the Working Group to review the draft commentary. The Working Group noted that it would be desirable for representatives and observers that had taken part in the preparation of the draft Model Law to participate in the informal ad hoc working party. It was noted that the meeting of the working party would be held at Vienna, possibly in October 1992.

255. The Working Group noted with interest that a note on the desirability and feasibility of preparing uniform law provisions on the procurement of services would be prepared by the Secretariat and submitted to the Commission at its twenty-sixth session together with other studies relating to the future plan of work of the Commission. The Working Group indicated that the note by the Secretariat could envisage different possible options as to the scope of the services that would be covered by such provisions.

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Annex

DRAFT MODEL LAW ON PROCUREMENT AS ADOPTED BY THE WORKING GROUP*

Preamble

WHEREAS the [Government] [Parliament] of this State considers it desirable to regulate procurement of goods and of construction so as to promote the objectives of:

(a) maximizing economy and efficiency in procurement;

(b) fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;

(c) promoting competition among suppliers and contractors for the supply of the goods or construction to be procured;

(d) providing for the fair and equitable treatment of all suppliers and contractors;

(e) promoting the integrity of, and fairness and public confidence in, the procurement process; and

(f) achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

(1) This Law applies to all procurement by procuring entities, except as otherwise provided by paragraph (2) of this article.

(2) Subject to the provisions of paragraph (3) of this article, this Law does not apply to:

(a) procurement involving national security or national defence;

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* Following the text of the draft Model Law is a comparative index indicating new article numbers assigned to the provisions of the draft Model Law following adoption by the Working Group.

/...

(b) ... (the enacting State may specify in this Law additional types of procurement to be excluded); or

(c) procurement of a type excluded by the procurement regulations.

(3) This Law applies to the types of procurement referred to in paragraph (2) of this article where and to the extent that the procuring entity expressly so declares to suppliers and contractors when first soliciting their participation in the procurement proceedings.

* * *

Article 2. Definitions

For the purposes of this Law:

(a) "procurement" means the acquisition by any means, including by purchase, rental, lease or hire-purchase, of goods or of construction, including services incidental to the supply of the goods or to the construction if the value of those incidental services does not exceed that of the goods or construction themselves;

(b) "procuring entity" means:

(i)

Option I for subparagraph (i)

any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except ...; (and)

Option II for subparagraph (i)

any department, agency, organ or other unit, or any subdivision thereof, of the ("Government" or other term used to refer to the national Government of the enacting State) that engages in procurement, except ...; (and)

(ii) (each State enacting this Model Law inserts in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity");

(c) "goods" includes raw materials, products, equipment and other physical objects of every kind and description, whether in solid, liquid or gaseous form, and electricity;

(d) "construction" means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as drilling, mapping, satellite photography, seismic investigations and similar activities incidental to such work if they are provided pursuant to the procurement contract;

(e) "supplier or contractor" means, according to the context, any potential party or the party to a procurement contract with the procuring entity;

(f) "procurement contract" means a contract between the procuring entity and a supplier or contractor resulting from procurement proceedings;

(g) "tender security" means a security provided to the procuring entity to secure the fulfilment of the obligation of a supplier or contractor submitting a tender to enter into a procurement contract if the contract is awarded to the supplier or contractor, including such arrangements as bank guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange;

(h) "currency" includes monetary unit of account.

* * *

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) treaty or other form of agreement to which it is a party with one or more other States,

(b) agreement with an intergovernmental international financing institution that is entered into by this State,

((c) agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions,)

the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law.

* * *

Article 4. Procurement regulations

The ... (each State enacting this Model Law specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.

* * *

Article 5. Public accessibility of legal texts

The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained.

* * *

Article 6. Qualifications of suppliers and contractors

(1) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers and contractors at any stage of the procurement proceedings.

(2) Subject to the right of suppliers and contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers and contractors participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers and contractors:

(a) possess the technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel, to perform the procurement contract;

(b) have legal capacity to enter into the procurement contract;

(c) are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

(d) have fulfilled their obligations to pay taxes and social security contributions in this State;

(e) have not, and their directors or officers have not, been convicted of any criminal offence, related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract, within a period of ... years (the State enacting this Law specifies a period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings.

(3) Any requirement established pursuant to paragraph (2) of this article shall be set forth in the prequalification documents, if any, and in the

solicitation documents and shall apply equally to all suppliers and contractors. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers and contractors other than those provided for in paragraph (2) of this article.

(4) The procuring entity shall evaluate the qualifications of suppliers and contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents.

(5) Subject to articles 8 (1) and 29 (4) (d), the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers and contractors that discriminates against or among suppliers and contractors or against categories thereof on the basis of nationality.

(6) The procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false or inaccurate.

(7) Except where prequalification proceedings have taken place, a supplier or contractor that claims to meet the qualification criteria shall not be precluded from participating in procurement proceedings for the reason that it has not provided proof that it is qualified pursuant to paragraph (2) of this article if the supplier or contractor undertakes to provide such proof no later than the deadline for the submission of tenders, and if it is reasonable to expect that the supplier or contractor will be able to do so.

* * *

Article 7. Prequalification proceedings

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapters III or IV, suppliers and contractors that are qualified. The provisions of article 6 shall apply to prequalification proceedings.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each supplier and contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents.

(3) The prequalification documents shall include, at a minimum, the information required to be specified in the invitation to tender by article 19 (1), except subparagraphs (f), (g) and (i) thereof, as well as the following information:

(a) instructions for preparing and submitting prequalification applications;

(b) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings;

(c) any documentary evidence or other information that must be submitted by suppliers and contractors to demonstrate their qualifications;

(d) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for suppliers and contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity;

(e) any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings.

(4) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity, which shall not identify the source of the request, shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to prequalify and shall be communicated to all suppliers and contractors to which the procuring entity provided the prequalification documents.

(5) The procuring entity shall make a decision with respect to the qualifications of each supplier or contractor submitting an application to prequalify. That decision shall be based solely on the criteria set forth in the prequalification documents.

(6) The procuring entity shall promptly notify each supplier and contractor submitting an application to prequalify whether or not it has been prequalified and shall make available to any member of the general public, upon request, the names of all suppliers and contractors that have been prequalified. Only suppliers and contractors that have been prequalified are entitled to participate further in the procurement proceedings.

(7) The procuring entity shall upon request communicate to suppliers and contractors that have not been prequalified the grounds therefor, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present.

(8) The procuring entity may require a supplier or contractor that has been prequalified to reconfirm its qualifications in accordance with the same criteria utilized to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier and contractor that fails to reconfirm its qualifications if requested to do so and may disqualify a supplier or

contractor if it finds at any time that the prequalification or reconfirmation information submitted was false or inaccurate. The procuring entity shall promptly notify each supplier and contractor requested to reconfirm its qualifications as to whether or not the supplier or contractor has succeeded in reconfirming its qualifications.

* * *

Article 8. Participation by suppliers and contractors

(1) Suppliers and contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.

(2) A procuring entity that limits participation on the basis of nationality pursuant to paragraph (1) of this article shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article, it shall so declare to them.

* * *

Article 9. Form of communications

(1) Subject to other provisions of this Law or any requirement of form specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, documents, notifications, decisions and other communications referred to in this Law to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication.

(2) Communications between suppliers and contractors and the procuring entity referred to in articles 7 (4) and (6), 11 (3), 26 (2) (a), 27 (1) (d), 29 (1), 30 (3) and 32 (1) may be made by a means of communication that does not provide a record of the content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation.

/...

(3) The procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.

* * *

Article 10. Rules concerning documentary evidence provided by suppliers and contractors

If the procuring entity requires the legalization of documentary evidence provided by suppliers and contractors to demonstrate their qualifications in procurement proceedings, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

* * *

Article 11. Record of procurement proceedings

(1) The procuring entity shall prepare a record of the procurement proceedings containing the following information:

(a) a brief description of the goods or construction to be procured, or of the procurement need for which the procuring entity requested proposals or offers;

(b) the names and addresses of suppliers and contractors that submitted tenders, proposals, offers or quotations;

(c) information relative to the qualifications, or lack thereof, of suppliers and contractors that submitted tenders, proposals, offers or quotations;

(d) the price and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract;

(e) a summary of the evaluation and comparison of tenders, proposals, offers or quotations;

(f) if all tenders were rejected pursuant to article 30, a statement to that effect and the grounds therefor, in accordance with article 30 (1);

(g) if, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor;

(h) the information required by article 12, if a tender, proposal, offer or quotation was rejected pursuant to that provision;

/...

(i) in tendering proceedings in which the procuring entity sends invitations to tender or to prequalify only to particular suppliers or contractors pursuant to article 18 (3), the statement required under that provision;

(j) in procurement proceedings involving methods of procurement other than tendering, the statement required under article 13 (2) of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

(k) in procurement proceedings in which the procuring entity, in accordance with article 8 (1), limits participation on the basis of nationality, a statement of the grounds relied upon by the procuring entity for imposing the limitation.

(2) The portion of the record referred to in subparagraphs (a), (b) and (i) of paragraph (1) of this article shall be made available for inspection by any person after a tender, proposal, offer or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.

(3) The portion of the record referred to in subparagraphs (c) to (g) of paragraph (1) of this article shall be made available for inspection by suppliers or contractors that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract, unless disclosure at an earlier stage is ordered by a competent court. However, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition;

(b) information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices.

(4) The procuring entity shall not be liable to contractors and suppliers for monetary damages solely as result of failure to prepare a record of the procurement proceedings in accordance with the present article.

* * *

Article 12. Inducements from suppliers and contractors

(Subject to approval by ... (each State designates an organ to issue the approval),) the procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it offers, gives or agrees to give to any current or former officer or employee of the procuring entity a gratuity, whether or not in the form of money, an offer of employment or any other thing or service of value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings. The rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.

* * *

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 13. Methods of procurement

(1) Except as otherwise provided by this chapter, a procuring entity engaging in procurement shall do so by means of tendering proceedings.

(2) A procuring entity that uses a method of procurement other than tendering proceedings pursuant to articles 14, 15 or 16 shall include in the record required under article 11 a statement of the grounds and circumstances on which it relied to justify the use of that particular method of procurement.

* * *

Article 14. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

(1) (Subject to approval by ... (each State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of two-stage tendering in accordance with article 33, or request for proposals in accordance with article 34, or competitive negotiation in accordance with article 35, in the following circumstances:

(a) the procuring entity is unable to formulate detailed specifications for the goods or construction and, in order to obtain the most satisfactory solution to its procurement needs,

- (i) it seeks proposals as to various possible means of meeting its needs; or,
- (ii) because of the technical character of the goods or construction, it is necessary for the procuring entity to negotiate with suppliers or contractors;

/...

(b) when the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) when the procuring entity applies this Law, pursuant to article 1 (2), to procurement involving national defence or national security and determines that the selected method is the most appropriate method of procurement; or

(d) when tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to articles 12, 29 (3) or 30, and when engaging in new tendering proceedings would be unlikely to result in a procurement contract.

(2) The procuring entity may engage in procurement by means of competitive negotiation also when:

(a) there is an urgent need for the goods or construction and engaging in tendering proceedings would therefore be impossible or imprudent, provided that the circumstances giving rise to the urgency were not foreseeable by, or a result of dilatory conduct on the part of, the procuring entity; or,

(b) owing to a catastrophic event, there is an urgent need for the goods or construction, making it impossible or imprudent to use other methods of procurement because of the amount of time involved in using those methods.

* * *

Article 15. Conditions for use of request for quotations

(1) (Subject to approval by ... (each State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of a request for quotations in accordance with article 36 for the procurement of readily available goods that are not specially produced to the particular specifications of the procuring entity and for which there is an established market, provided that the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.

(2) The procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1) of this article.

* * *

Article 16. Conditions for use of single-source procurement

(Subject to approval by ... (each State designates an organ to issue the approval),) the procuring entity may engage in single-source procurement in accordance with article 37 when:

/...

(a) the goods or construction are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods or construction, and no reasonable alternative or substitute exists;

(b) there is an urgent need for the goods or construction and engaging in tendering proceedings would therefore be impossible or imprudent, provided that the circumstances giving rise to the urgency were not foreseeable by, or a result of dilatory conduct on the part of, the procuring entity;

(c) owing to a catastrophic event, there is an urgent need for the goods or construction, making it impossible or imprudent to use other methods of procurement because of the amount of time involved in using those methods;

(d) the procuring entity, having procured goods, equipment or technology from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment or technology, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods in question;

(e) the procuring entity seeks to enter into a contract with the supplier or contractor for the purpose of research, experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs;

(f) the procuring entity applies this Law, pursuant to article 1 (2), to procurement involving national defence or national security and determines that single-source procurement is the most appropriate method of procurement; or

(g) procurement from a particular supplier or contractor is necessary in order to promote a policy specified in article 29 (4) (c) (iii) and approval is obtained following public notice and adequate opportunity to comment, provided that procurement from no other supplier or contractor is capable of promoting that policy.

* * *

CHAPTER III. TENDERING PROCEEDINGS

SECTION I. SOLICITATION OF TENDERS AND OF APPLICATIONS TO PREQUALIFY

Article 17. Domestic tendering

In procurement proceedings in which

(a) participation is limited solely to domestic suppliers or contractors pursuant to article 8 (1), or

(b) the procuring entity decides, in view of the low amount or value of the goods or works to be procured, that only domestic suppliers or contractors are likely to be interested in submitting tenders,

the procuring entity shall not be required to employ the procedures set out in articles 11 (2), 19 (1) (h), 19 (1) (i), 19 (2) (c), 19 (2) (d), 21 (j), 21 (k), 21 (r), 22 (4) and 27 (1) (c) of this Law.

* * *

Article 18. Procedures for soliciting tenders or applications to prequalify

(1) A procuring entity shall solicit tenders or, where applicable, applications to prequalify by causing an invitation to tender or an invitation to prequalify, as the case may be, to be published in ... (each State enacting this Model Law specifies the official gazette or other official publication in which the invitation to tender or to prequalify is to be published).

(2) The invitation to tender or invitation to prequalify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical journal of wide international circulation.

(3) Notwithstanding the provisions of paragraphs (1) and (2) of this article, the procuring entity may, when necessary for reasons of economy and efficiency, (and subject to approval by ... (each State may designate an organ to issue the approval),) solicit tenders, or, where applicable, applications to prequalify, by sending invitations to tender or invitations to prequalify, as the case may be, only to particular suppliers or contractors selected by it. The procuring entity shall select a sufficient number of suppliers and contractors to ensure effective competition, consistent with the efficient conduct of the tendering proceedings. The grounds and circumstances for employing this procedure shall be recorded in the record of the procurement proceedings.

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Article 19. Contents of invitation to tender and invitation to prequalify

(1) The invitation to tender shall contain at least the following information:

(a) the name and address of the procuring entity;

(b) the nature and quantity of the goods to be supplied or the nature and location of the construction to be effected;

(c) the desired or required time for the supply of the goods or for the completion of the construction;

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(d) the criteria and procedures to be used for evaluating the qualifications of suppliers and contractors, in conformity with article 8 (1) (a);

(e) a declaration, which may not later be altered, that suppliers and contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article 8 (1), as the case may be;

(f) the means of obtaining the solicitation documents and the place from which they may be obtained;

(g) the price, if any, charged by the procuring entity for the solicitation documents;

(h) the currency and means of payment for the solicitation documents;

(i) the language or languages in which the solicitation documents are available;

(j) the place and deadline for the submission of tenders.

(2) An invitation to prequalify need not contain the information referred to in subparagraphs (f), (i) and (j) of paragraph (1) of this article, but shall contain the other information referred to in paragraph (1), as well as the following information:

(a) the means of obtaining the prequalification documents and the place from which they may be obtained;

(b) the price, if any, charged by the procuring entity for the prequalification documents;

(c) the currency and terms of payment for the prequalification documents;

(d) the language or languages in which the prequalification documents are available;

(e) the place and deadline for the submission of applications to prequalify.

* * *

Article 20. Provision of solicitation documents

The procuring entity shall provide the solicitation documents to suppliers and contractors in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier and contractor that has been prequalified and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of printing them and providing them to suppliers and contractors.

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Article 21. Contents of solicitation documents

The solicitation documents shall include, at a minimum, the following information:

(a) instructions for preparing tenders;

(b) the criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers and contractors and relative to the reconfirmation of qualifications pursuant to article 29 (6);

(c) the requirements as to documentary evidence or other information that must be submitted by suppliers and contractors to demonstrate their qualifications;

(d) the nature and required technical and quality characteristics, in conformity with article 22, of the goods or construction to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; the location where the construction is to be effected; any incidental services to be performed; and the desired or required time, if any, when the goods are to be delivered or the construction is to be effected;

(e) the factors to be used by the procuring entity in determining the successful tender, including any margin of preference and any factors other than price to be used pursuant to article 29 (4) (b), (c) and (d) and the relative weight of such factors;

(f) the terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;

(g) if alternatives to the characteristics of the goods, construction, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect;

(h) if suppliers and contractors are permitted to submit tenders for only a portion of the goods or construction to be procured, a description of the portion or portions for which tenders may be submitted;

(i) the manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the goods or construction themselves, such as transportation and insurance charges, customs duties and taxes;

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(j) the currency or currencies in which the tender price is to be formulated and expressed;

(k) the language or languages, in conformity with article 24, in which tenders are to be prepared;

(l) any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers and contractors submitting tenders, and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and materials bonds;

(m) the manner, place and deadline for the submission of tenders, in conformity with article 25;

(n) the means by which, pursuant to article 23, suppliers and contractors may seek clarifications of the solicitation documents and a statement as to whether the procuring entity intends to convene a meeting of suppliers and contractors;

(o) the period of time during which tenders shall be in effect, in conformity with article 26;

(p) the place, date and time for the opening of tenders, in conformity with article 28;

(q) the procedures to be followed for opening and examining tenders;

(r) the currency that will be used for the purpose of evaluating and comparing tenders pursuant to article 29 (5) and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(s) references to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 38 or give rise to liability on the part of the procuring entity;

(t) the name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers and contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(u) any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(v) notice of the right provided under article 38 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(w) if the procuring entity reserves the right to reject all tenders pursuant to article 30, a statement to that effect;

(x) any formalities that will be required once a tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article 32, and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(y) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.

* * *

Article 22. Rules concerning description of goods or construction in prequalification documents and solicitation documents; language of prequalification documents and solicitation documents

(1) Specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods or construction to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, that create obstacles to participation, including obstacles based on nationality, by suppliers or contractors in the procurement proceedings shall not be included or used in the prequalification documents or in the solicitation documents.

(2) To the extent possible, specifications, plans, drawings, designs and requirements shall be based on the relevant objective technical and quality characteristics of the goods or construction to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods or construction to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods or construction to be procured shall be used, where available, in formulating the specifications, plans, drawings and designs to be included in the prequalification documents and in the solicitation documents;

(b) Standardized trade terms shall be used, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents and of the solicitation documents.

(4) The prequalification documents and the solicitation documents shall be formulated in ... (each State enacting this Model Law specifies its official language or languages) (and in a language customarily used in international trade).

* * *

Article 23. Clarifications and modifications of solicitation documents

(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of tenders. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender and shall, without identifying the source of the request, communicate the clarification to all suppliers and contractors to which the procuring entity has provided the solicitation documents.

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether at its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers and contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers and contractors.

(3) If the procuring entity convenes a meeting of suppliers and contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers and contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers and contractors to take the minutes into account in preparing their tenders.

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SECTION II. SUBMISSION OF TENDERS

Article 24. Language of tenders

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language which the procuring entity specifies in the solicitation documents.

* * *

Article 25. Submission of tenders

(1) The procuring entity shall fix a specific date and time as the deadline for the submission of tenders.

(2) If, pursuant to article 23, the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers and contractors is held, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford suppliers and contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more suppliers or contractors to submit their tenders by the deadline due to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier and contractor to which the procuring entity provided the solicitation documents.

(5) A tender shall be submitted in writing and in a sealed envelope. The procuring entity shall on request provide to the supplier or contractor a receipt showing the date and time when its tender was received.

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

* * *

Article 26. Period of effectiveness of tenders; modification and withdrawal of tenders

(1) Tenders shall be in effect during the period of time specified in the solicitation documents. The period of time shall commence at the deadline for submission of tenders.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. A supplier or contractor may refuse

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the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness;

(b) Suppliers and contractors that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or, if it is not possible to do so, provide new tender securities, to cover the extended period of effectiveness of their tenders. A supplier or contractor whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

(3) A supplier or contractor may modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for the submission of tenders.

* * *

Article 27. Tender securities

(1) When the procuring entity requires suppliers and contractors submitting tenders to provide a tender security:

(a) the requirement shall apply to all such suppliers and contractors;

(b) the solicitation documents may stipulate that the institution or entity issuing the tender security and the institution or entity, if any, confirming the tender security, as well as the form and terms of the tender security, must be acceptable to the procuring entity;

(c) notwithstanding the provisions of subparagraph (b) of this paragraph, a tender security shall not be rejected by the procuring entity on the grounds that the tender security was not issued by an institution or entity in this State if the tender security and the institution or entity otherwise conform to requirements set forth in the solicitation documents (, unless the acceptance by the procuring entity of such a tender security would be in violation of a law of this State);

(d) prior to submitting a tender, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a tender security, or of a proposed confirming institution, if required; the procuring entity shall respond promptly to such a request;

(e) confirmation of the acceptability of a proposed issuer or of any proposed confirming institution does not preclude the procuring entity from rejecting the tender security on the ground that the issuer or the confirming institution, as the case may be, has become insolvent or otherwise lacks creditworthiness;

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(f) the procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required tender security; any requirement that refers directly or indirectly to conduct by the supplier or contractor submitting the tender shall not relate to conduct other than:

(i) withdrawal or modification of the tender after the deadline for submission of tenders;

(ii) failure to sign the procurement contract if required by the procuring entity to do so;

(iii) failure to provide a required security for the performance of the contract after the tender has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

(2) The procuring entity shall make no claim to the amount of the tender security, and shall, without delay, return or procure the return of the tender security document, after the earliest to occur of:

(a) the expiry of the tender security;

(b) the entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required;

(c) the termination of the tendering proceedings without the entry into force of a procurement contract;

(d) the withdrawal of the tender in connection with which the tender security was supplied prior to the deadline for the submission of tenders.

* * *

SECTION III. EVALUATION AND COMPARISON OF TENDERS

Article 28. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

(2) All suppliers and contractors that have submitted tenders or their representatives shall be permitted by the procuring entity to be present at the opening of tenders.

(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers and contractors that

have submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article 11.

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Article 29. Examination, evaluation and comparison of tenders

(1) (a) The procuring entity may ask suppliers and contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted;

(b) Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors apparent on the face of a tender. The procuring entity shall give notice of the correction to the supplier or contractor that submitted the tender.

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents;

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.

(3) The procuring entity shall not accept a tender:

(a) if the supplier or contractor that submitted the tender is not qualified;

(b) if the supplier or contractor that submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1) (b) of this article;

(c) if the tender is not responsive;

(d) in the circumstances referred to in article 12.

(4) (a) The procuring entity shall evaluate and compare the tenders that have been accepted in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents;

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(b) The successful tender shall be:

(i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph; or

(ii) if the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of factors specified in the solicitation documents, which factors shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable;

(c) In determining the lowest evaluated tender in accordance with subparagraph (b) (ii) of this paragraph, the procuring entity may consider only the following:

(i) the tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph;

(ii) the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods or completion of construction, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods or construction;

(iii) the effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers and contractors, the extent of local content, including manufacture, labour and materials, in goods being offered by suppliers and contractors, the economic development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [... (the enacting State may expand subparagraph (iii) by including additional factors)]; and

(iv) national defence and security considerations;

(d) If authorized by the procurement regulations, (and subject to approval by ... (each State designates an organ to issue the approval),) in evaluating and comparing tenders, a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods. The margin of preference shall be calculated in accordance with the procurement regulations.

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency for the purpose of evaluating and comparing tenders.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article 7, the procuring entity may require the supplier or contractor submitting the tender that has been found to be the successful tender pursuant to paragraph (4) (b) of this article to reconfirm its qualifications in accordance with criteria and procedures conforming to the provisions of article 6. The criteria and procedures to be used for such reconfirmation shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to reconfirm its qualifications in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders, subject to the right of the procuring entity, in accordance with article 30 (1), to reject all remaining tenders.

(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision of which tender should be accepted, except as provided in article 11.

* * *

Article 30. Rejection of all tenders

(1) (Subject to approval by ... (each State designates an organ to issue the approval), and) if so specified in the solicitation documents, the procuring entity may reject all tenders at any time prior to the acceptance of a tender. The procuring entity shall upon request communicate to any supplier or contractor that submitted a tender the grounds for its rejection of all tenders, but is not required to justify those grounds.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers and contractors that have submitted tenders.

(3) Notice of the rejection of all tenders shall be given promptly to all suppliers and contractors that submitted tenders.

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Article 31. Negotiations with suppliers and contractors

No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or contractor.

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Article 32. Acceptance of tender and entry into force of procurement contract

(1) Subject to articles 29 (7) and 30, the tender that has been ascertained to be the successful tender pursuant to article 29 (4) (b) shall be accepted. Notice of acceptance of the tender shall be given promptly to the supplier or contractor submitting the tender.

(2) (a) Notwithstanding the provisions of paragraph (4) of this article, the solicitation documents may require the supplier or contractor whose tender has been accepted to sign a written procurement contract conforming to the tender. In such cases, the procuring entity (the requesting ministry) and the supplier or contractor shall sign the procurement contract within a reasonable period of time after the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor;

(b) Subject to paragraph (3) of this article, where a written procurement contract is required to be signed pursuant to subparagraph (a) of this paragraph, the procurement contract enters into force when the contract is signed by the supplier or contractor and by the procuring entity. Between the time when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor and the entry into force of the procurement contract, neither the procuring entity nor the supplier or contractor shall take any action which interferes with the entry into force of the procurement contract or with its performance.

(3) Where the procurement contract is required to be approved by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated period of time following dispatch of the notice of acceptance of the tender that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of tenders specified in the solicitation documents pursuant to article 26 (1) or the period of effectiveness of tender securities that may be required pursuant to article 27 (1).

(4) Except as provided in paragraphs (2) (b) and (3) of this article, a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor that submitted the tender, provided that it is dispatched while the tender is in force. The notice is dispatched when it is properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by a mode authorized by article 9.

(5) If the supplier or contractor whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the procuring entity shall select a successful tender in accordance with article 29 (4) from among the remaining tenders that are in force, subject to the right of the

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procuring entity, in accordance with article 30 (1), to reject all remaining tenders. The notice provided for in paragraph (1) of this article shall be given to the supplier or contractor that submitted that tender.

(6) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given to other suppliers and contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the price of the contract.

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CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING

Article 33. Two-stage tendering

(1) The provisions of chapter III of this Law shall apply to two-stage tendering proceedings except to the extent those provisions are derogated from in this article.

(2) The solicitation documents shall call upon suppliers and contractors to submit, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the goods or construction as well as to contractual terms and conditions of their supply.

(3) The procuring entity may engage in negotiations with any supplier or contractor whose tender has not been rejected pursuant to articles 12, 29 (3), or 30 concerning any aspect of its tender.

(4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite suppliers and contractors whose tenders have not been rejected to submit final tenders with prices with respect to a single set of specifications. In formulating those specifications, the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the goods or construction to be procured, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law. Any such deletion, modification or addition shall be communicated to suppliers and contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article 29 (4) (b).

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Article 34. Request for proposals

(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical journal of wide international circulation a notice seeking expression of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.

(3) The procuring entity shall establish the factors for evaluating the proposals and determine the relative weight to be accorded to each such factor and the manner in which they are to be applied in the evaluation of the proposals. The factors shall concern:

(a) the relative managerial and technical competence of the supplier or contractor;

(b) the effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and

(c) the price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.

(4) A request for proposals issued by a procuring entity shall include at least the following information:

(a) the name and address of the procuring entity;

(b) a description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected;

(c) the factors for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such factor, and the manner in which they will be applied in the evaluation of the proposal; and

(d) the desired format and any instructions, including any relevant time-frames, applicable in respect of the proposal.

(5) Any modification or clarification of the request for proposals, including modification of the factors for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers and contractors participating in the request-for-proposals proceedings.

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(6) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers and contractors.

(7) The procuring entity may engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) any negotiations between the procuring entity and a supplier or contractor shall be confidential;

(b) subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;

(c) the opportunity to participate in negotiations is extended to all suppliers and contractors that have submitted proposals and whose proposals have not been rejected.

(8) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(9) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) only the factors referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;

(b) the effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) the price of a proposal shall only be considered by the procuring entity after completion of the technical evaluation;

(d) the procuring entity may refuse to evaluate proposals submitted by suppliers or contractors it considers unreliable or incompetent.

(10) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the factors for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those factors indicated in the request for proposals.

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Article 35. Competitive negotiation

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers and contractors to ensure effective competition.

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(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers and contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article 11, one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.

(4) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

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Article 36. Request for quotations

(1) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three, if possible. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the goods themselves, such as transportation and insurance charges, customs duties and taxes, are to be included in the price.

(2) Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation submitted by the supplier or contractor.

(3) The procurement contract shall be awarded to the supplier or contractor that gave the lowest-priced quotation responsive to the needs of the procuring entity and that is considered reliable by the procuring entity.

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Article 37. Single-source procurement

In the circumstances set forth in article 16 the procuring entity may procure the goods or construction by soliciting a proposal or price quotation from a single supplier or contractor.

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CHAPTER V. REVIEW*

Article 38. Right to review

(1) Subject to paragraph (2) of this article, any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the procuring entity by this Law may seek review in accordance with articles 39 through [43].

(2) The following shall not be subject to the review provided for in paragraph (1) of this article:

(a) the selection of a method of procurement pursuant to articles 13 to 16;

(b) the limitation of procurement proceedings in accordance with article 8 on the basis of nationality;

(c) the limitation of solicitation of tenders on the ground of economy and efficiency pursuant to article 18 (3);

(d) a decision by the procuring entity under article 28 (1) to reject all tenders;

(e) a refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings pursuant to article 34 (2).

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Article 39. Review by procuring entity (or by approving authority)

(1) Unless the procurement contract has already entered into force, a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. (However, if the complaint is based on an act or decision of, or procedure followed by, the procuring entity, and that act, decision or procedure was approved by an authority pursuant to this Law, the complaint shall instead be submitted to the head of the authority that approved the act, decision or procedure.) A reference in this Law to the head of the procuring entity (or the head of the approving authority) includes any person designated by the head of the procuring entity (or by head of the approving authority, as the case may be).

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* States enacting the Model Law may wish to incorporate the articles on review without change or with only such minimal changes as are necessary to meet particular important needs. However, because of constitutional or other considerations, States might not see fit, to one degree or another, to incorporate those articles. In such cases, the articles on review may be used to measure the adequacy of existing review procedures.

(2) The head of the procuring entity (or of the approving authority) shall not entertain a complaint, unless it was submitted within 20 days of when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

(3) The head of the procuring entity (or of the approving authority) need not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.

(4) Unless the complaint is resolved by mutual agreement of the supplier or contractor that submitted it and the procuring entity, the head of the procuring entity (or of the approving authority) shall, within 30 days after the submission of the complaint, issue a written decision. The decision shall:

(a) state the reasons for the decision; and

(b) if the complaint is upheld in whole or in part, indicate the corrective measures that are to be taken.

(5) If the head of the procuring entity (or of the approving authority) does not issue a decision by the time specified in paragraph (4) of this article, the supplier or contractor submitting the complaint (or the procuring entity) is entitled immediately thereafter to institute proceedings under article [40 or 43]. Upon the institution of such proceedings the competence of the head of the procuring entity (or of the approving authority) to entertain the complaint ceases.

(6) The decision of the head of the procuring entity (or of the approving authority) shall be final unless proceedings are instituted under article [40 or 43].

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Article 40. Administrative review*

(1) A supplier or contractor entitled under article 38 to seek review may submit a complaint to [insert name of administrative body]:

(a) if the complaint cannot be submitted or entertained under article 39 because of the entry into force of the procurement contract, and provided that the complaint is submitted within 20 days after the earlier of the time when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or the time when that supplier or contractor should have become aware of those circumstances;

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* States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 40 and provide only for judicial review (article 43).

(b) if the head of the procuring entity does not entertain the complaint because the procurement contract has entered into force, provided that the complaint is submitted within 20 days after the issuance of the decision not to entertain the complaint;

(c) pursuant to article 39 (5), provided that the complaint is submitted within 20 days after the expiry of the period referred to in article 39 (4); or

(d) if the supplier or contractor claims to be adversely affected by a decision of the head of the procuring entity (or of the approving authority) under article 39, provided that the complaint is submitted within 20 days after the issuance of the decision.

(2) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity (or to the approving authority).

(3) The [insert name of administrative body] may [grant] [recommend]* one or more of the following remedies, unless it dismisses the complaint:

(a) declare the legal rules or principles that govern the subject-matter of the complaint;

(b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) annul in whole or in part an unlawful act or decision of the procuring entity, other than any act or decision bringing the procurement contract into force;

(e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force;

(f) require the payment of compensation for

Option I

any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings

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* Optional language is presented in order to accommodate those States where review bodies do not have the power to grant the remedies listed below but can make recommendations.

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Option II

loss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings

as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

(g) order that the procurement proceedings be terminated.

(4) The [insert name of administrative body] shall within 30 days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(5) The decision shall be final unless an action is commenced under article 40.

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Article 41. Certain rules applicable to review proceedings under article 39 [and article 40]

(1) Promptly after the submission of a complaint under article 39 [or article 40], the head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body], as the case may be,] shall notify all suppliers and contractors participating in the procurement proceedings to which the complaint relates of the submission of the complaint and of its substance.

(2) Any such supplier or contractor or any governmental authority whose interests are or could be affected by the review proceedings has a right to participate in the review proceedings. A supplier or contractor that fails to participate in the review proceedings is barred from subsequently making the same type of claim.

(3) A copy of the decision of the head of the procuring entity (or of the approving authority) [, or of the [insert name of administrative body], as the case may be,] shall be furnished within five days after the issuance of the decision to the supplier or contractor submitting the complaint, to the procuring entity and to any other supplier or contractor or governmental authority that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.

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Article 42. Suspension of procurement proceedings

(1) The timely submission of a complaint under article 39 [or article 40] suspends the procurement proceedings for a period of seven days, provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers and contractors.

(2) When the procurement contract enters into force, the timely submission of a complaint under article 40 shall suspend performance of the procurement contract for a period of seven days, provided the complaint meets the requirements set forth in paragraph (1) of this article.

(3) The head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body],] may extend the suspension provided for in paragraph (1) of this article, [and the [insert name of administrative body] may extend the suspension provided for in paragraph (2) of this article,] in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed 30 days.

(4) The suspension provided for by this article shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.

(5) Any decision by the procuring entity under this article and the grounds and circumstances therefor shall be made part of the record of the procurement proceedings.

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Article 43. Judicial review

The [insert name of court or courts] has jurisdiction over actions pursuant to article 38 and petitions for judicial review of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time-limit, under article 39 [or 40].

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Comparative index of articles

The following index indicates new article numbers assigned to the provisions of the draft Model Law on Procurement following adoption by the Working Group.

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